

SUPREME COURT OF INDIA

CIVIL WRIT PETITION 829 / 2013

IN THE MATTER OF:

S.G. VOMBATKERE & ANR.

...PETITIONERS

*Versus*

UNION OF INDIA & ORS.

...RESPONDENTS

COMPILATION

VOLUME VI

ACADEMIC ARTICLES &  
REPORTS

*(See Inside for Index)*

Submitted on behalf of the Petitioners

**VOLUME VI**  
**ACADEMIC ARTICLES & REPORTS**

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## **CONSTITUENT ASSEMBLY OF INDIA** **Wednesday , the 22nd January , 1947**

The Constituent Assembly of India met in the Constitution Hall , New Delhi , at Eleven of the Clock , Mr . President (The Hon'ble Dr . Rajendra Prasad ) in the Chair .

### **RESOLUTION RE : AIMS AND OBJECTS —contd .**

**Mr . President :** There are three items in the Agenda to -day —

- 1 . Discussion of the Resolution that has been going on for some days.
- 2 . Another Resolution about Bhutan and Sikkim to be moved by Pandit Jawaharlal Nehru , and
- 3 . Budget .

I think we had better complete the discussion on the Objectives Resolution which has been moved by Pandit Jawaharlal Nehru . I noticed yesterday that Members wanted closure on that and if that is the feeling of the House , then I would ask Pandit Jawaharlal Nehru to straight -away say what he has to say in reply and complete the discussion .

**Mr . H .J Khandekar** (C .P and Berar : General ):<sup>1</sup>[I want to express my views on the Resolution before the House later on . The Independence Day falls on the 26th January . This Resolution seeks to make India free and therefore the decision on it should also be taken on 26th January . Though 26th January is a holiday . I would propose , that a resolution of so great importance should be passed on the Independence Day . Therefore . I request that the Assembly should meet on that day , may be , for a few minutes only .]<sup>1</sup>

**Rai Bahadur Syamanandan Sahaya** (Bihar : General ) : Sir , I beg the leave of the House to withdraw the two amendments which stand in my name . (*Hear , hear .*).

**Mr . President :** Rai Bahadur Syamanandan Sahaya had moved two amendments to the Resolution . He wants leave of the House now to withdraw them . Do I take it that the House agrees ?

**Hon'ble Members :** Yes .

**Mr . President :** Those two amendments are withdrawn . We have now got only the main Resolution . There is no other amendment .

A suggestion has just been put forward by Mr . Khandekar that we should pass this Resolution on the 26th , but unfortunately that happens to be a Sunday .

**Mr . H .J Khandekar :** There should be a session of the Assembly for a few minutes because this Resolution is an important resolution and should be passed on the Independence Day . 26th is a Sunday and I therefore request the Chair to have the session for a few minutes to consider this Resolution and pass it .

**Mr . President :** We shall see about it after Pandit Jawaharlal Nehru has spoken . I shall take the vote of the House whether it should be passed today or not .

**Hon'ble Members :** Today .

**Mr . President :** Then 22nd has to become 26th . Pandit Jawaharlal Nehru .

**The Hon'ble Pandit Jawaharlal Nehru** (United Provinces : General ):<sup>1</sup>—[Mr. President, six weeks have passed since I moved this Resolution. I had thought then that the Resolution would be discussed and passed within two or three days, but later the House decided to postpone it in order to give time to others to think over it. The decision to postpone an important Resolution like this was probably not to the linking of others like me, but I did not doubt that the decision was sound and proper. The anxiety and impatience in our hearts was not for the passage of the Resolution, which was simply a symbol, but to attain the high aims which were enshrined in it. It is also our intense desire to march on with all others and reach our goal with millions of Indians. Therefore, it was advisable to postpone the Resolution and to afford ample opportunity not only to this House but also to the country in general to think over it. The sense of all amendments and specially the amendment moved by Dr. Jayakar was generally for postponement. I am grateful to Dr. Jayakar for the withdrawal of his amendment and I thank the others also who have withdrawn their amendments. Many Members have spoken on the Resolution. Their number may be thirty or forty or more. Almost all of them have supported it without any criticism. Some of them, of course, have drawn our attention to some particular matters. I am of opinion, that if a plebiscite of the crores of people of India is taken, all of them will be found to stand for the Resolution; though there might be some who would lay more or less emphasis on some particular aspect of the Resolution. The Resolution was meant to clothe in words the desire of crores of Indians and it was very carefully worded so as to avoid any strongly controversial issue. There is no need to say a great deal about this but with your permission, I would like to draw your attention to some points. One of the reasons for the postponement of the Resolution was that we wished that our brothers who had not come here, should be in a position to decide to come in. They have had a full month to consider the matter but I regret that they have not yet decided to come. However as I have already said at the outset, we will keep the door open for them and they will be welcomed up to the last moment, and we will give them and others, who have a right to come in, every opportunity for coming in. But it is clear that while the door remains open, our work cannot be held up. It has, therefore, become indispensable for us to proceed further and carry the Resolution to its logical conclusion. I have hopes that even at this stage those, who are absent, would decide to come in.

Some of us, even though they are in agreement with this Resolution, were in favour of postponing some other business, too so that the absentees might not find any obstacle in their way to come in. I am in sympathy with this suggestion but in spite of this I am at a loss to understand how this suggestion could be put forward. That is a question of waiting, not that of postponing the Resolution. We have waited for six long weeks. This is no matter of weeks; ages have slipped by while we have been waiting. How long are we to wait now? Many of us who waited have since passed away and many are nearing the end of their lives. We have waited enough and now we cannot wait any longer. We are to further the work of the Assembly, speed up the pace and finish our work soon. You should bear in mind that this Assembly is not only to pass resolutions, I may point out, that the Constitution, which we frame, is not an end by itself, but it would be only the basis for further work.

The first task of this Assembly is to free India through a new constitution to feed the starving people and cloth the naked masses and to give every Indian fullest opportunity to develop himself according to his capacity. This is certainly a great task. Look at India today. We are sitting here and there in despair in many places,



and unrest in many cities . The atmosphere is surcharged with these quarrels and feuds which are called communal disturbances , and unfortunately we sometimes cannot avoid them . But at present the greatest and most important question in India is how to solve the problem of the poor and the starving . Wherever we turn , we are confronted with this problem . If we cannot solve this problem soon , all our paper constitutions will become useless and purposeless . Keeping this aspect in view , who could suggest to us to postpone and wait ?

A point has been raised from one side that some ideas contained in the Resolution do not commend themselves to the Rulers of the States , because they conflict with the powers of the Princes . A suggestion has also been made to postpone the decision about the States in the absence of their representatives . It is a fact they are not present here but if we wait for them it is not possible for us to finish the work even at the end of the Constituent Assembly according to the plan . This is impossible . Our scheme was not that they should come in at the end . We invited them to come in at the beginning . If they come , they are welcome . No body is going to place any obstacles . If there is any hesitation , it is on their part only . A month ago you formed a Committee to get into touch with 'their representatives' . We were always anxious to discuss with them although we did not get any opportunity for it . That is no fault of ours . We did not ask for time . We want to finish our work as early as possible . I am informed they complain of the following words contained in the Resolution .

"Sovereignty belong to the people and rests with the people " . That is to say , the final decision should rest with the people of the States . They object to this . It is certainly a surprising objection . It may not be very surprising if those people who have lived in an atmosphere of mediavalism do not give up their cherished illusions , but in the modern age how can a man believe for a moment in the divine and despotic rights of a human being ? I fail to understand how any Indian , whether he belongs to a State or to any other part of the country , could dare utter such things . It is scandalous now to put forward an idea which originated in the world hundreds of years ago and was buried deep in the earth long before our present age . However , I would respectfully tell them to desist from saying such things . They are putting a wrong thing before the world and by doing so they are lowering their own status and weakening their own position . At least this Assembly is not prepared to damage its very foundation and , if it does so , it will shake the very basis of our whole constitution .

We claim in this Resolution to frame a free and democratic Indian Republic . A question may be asked what relation will that Republic bear to other countries of the world ? What would be its relations with England , the British Commonwealth and other countries ? This Resolution means that we are completely free and are not included in any group except the Union of Nations which is now being formed in the world . The truth is that the world has totally changed . The meanings of words too are changing . Today any man who can think a little , will come to the conclusion that the only way to remove the doubts and dangers from the world , is to unite all the nations and ask them to work together and help each other . The organisation of the United Nations is not free from big gaps and fissures . Thousands of difficulties lie ahead and a great deal of suspicion exists between countries . I have already said that we are not thinking in terms of isolating ourselves from the world . We will work in complete cooperation with other countries . It is not an easy thing to work in cooperation with England or the British Commonwealth , and yet we are prepared to do so . We will forget our old quarrels , strive to achieve our complete independence and stretch our hands of friendship to other countries , but that friendship shall in no case mar or weaken our freedom .

This is not a resolution of war ; it is simply to put our legitimate rights before the world ; and in doing so if we are challenged , we will not hesitate in accepting that challenge . But after all , this is resolution of goodwill and compromise , among the people of India , whatever their community or religion and with the different countries of the world including England and the British Commonwealth of Nations . The Resolution claims to be on friendly terms with all and it has been put before you with that motive and intention . I hope you will accept it .

A friend has suggested that it would be advisable to move the Resolution just on the eve of the Independence Day which is due to come after four days only . But I will ask him if it is proper to delay a proper thing even for a moment ? Not a moment's postponement is advisable and we should finish our work as soon as possible .

This Resolution which has been put before you is in a new form and in a new shape , but I would like to tell you that it has a long trail of resolutions pledges and declarations including the world -famed resolutions of "Independence " and "Quit India " behind . It is high time to fulfil our pledges which we made from time to time . How are these pledges to be fulfilled ? The right answer lies with you and I hope you will not only accept the Resolution but also fulfil it as you fulfil a solemn pledge .

One thing more I would like to tell you . We have been confronted and will again be confronted with various questions . Persons of various groups , Communities , and interests would look at it from different points of view , and diverse questions and problems would be raised by them , but we should all bear in mind that we should not , on the eve of Independence , allow ourselves to be carried away by petty matters . If India goes down , all will go down ; if India thrives , all will thrive and if India lives , all will live including the parties , communities and groups .

With your permission I would like to say something in English also .]

Mr . President , it was my proud privilege , Sir , six weeks ago , to move this Resolution before this Hon'ble House . I felt the weight and solemnity of that occasion . It was not a mere form of words that I placed before the House , carefully chosen as those words were . But those words and the Resolution represented something far more ; they represented the depth of our being ; they represented the agony and hopes of the nation coming at last to fruition . As I stood here on that occasion I felt the past crowding round me , and I felt also the future taking shape . We stood on the razor's edge of the present , and as I was speaking , I was addressing not only this Hon'ble House , but the millions of India , who were vastly interested in our work . And because I felt that we were coming to the end of an age , I had a sense of our forbears watching this undertaking of ours and possibly blessing it , if we moved aright , and the future , of which we became trustees , became almost a living thing , taking shape and moving before our eyes . It was a great responsibility to be trustees of the future , and is was some responsibility also to be inheritors of the great past of ours . And between that great past and the great future which we envisage , we stood on the edge of the present and the weight of that occasion , I have no doubt , impressed itself upon this Hon'ble House .

So , I placed this Resolution before the House , and I had hoped that it could be passed in a day or two and we could start our other work immediately . But after a long debate this House decided to postpone further consideration of this Resolution . May I confess that I was a little disappointed because I was impatient that we should go forward ? I felt that we were not true to the pledges that we had taken by lingering on the road . It was a bad beginning that we should postpone even such an important Resolution about objectives . Would that imply that our future work would

go along slowly and be postponed from time to time ? Nevertheless . I have no doubt , that the decision this House took in its wisdom in postponing this Resolution , was a right decision , because we have always balanced two factors , one , the urgent necessity in reaching our goal , and the other , that we should reach it in proper time and with as great a unanimity as possible . It was right , therefore , if I may say with all respect , that this House decided to adjourn consideration of this Motion and thus not only demonstrated before the world our earnest desire to have all those people here who have not so far come in here , but also to assure the country and everyone else , how anxious we were to have the cooperation of all . Since then six weeks have passed , and during these weeks there has been plenty of opportunity for those , who wanted to come , to come . Unfortunately , they have not yet decided to come and they still hover in this state of indecision . I regret that , and all I can say is this , that we shall welcome them at any future time when they may wish to come . But it should be made clear without any possibility of misunderstanding that no work will be held up in future , whether any one comes or not . (Cheers .) There has been waiting enough . Not only waiting six weeks , but many in this country have waited for years and years , and the country has waited for some generations now . How long are we to wait ? And if we , some of us , who are more prosperous can afford to wait , what about the waiting of the hungry and the starving ? This Resolution will not feed the hungry or the starving , but it brings a promise of many things —it brings the promise of freedom , it brings the promise of food and opportunity for all . Therefore , the sooner we set about it the better . So we waited for six weeks , and during these six weeks the country thought about it , pondered over it , and other countries also , and other people who are interested have thought about it . Now we have come back here to take up the further consideration of this Resolution . We have had a long debate and we stand on the verge of passing it . I am grateful to Dr . Jayakar and Mr . Sahaya for having withdrawn their amendments . Dr . Jayakar's purpose was served by the postponing of this Resolution , and it appears now that there is no one in this House who does not accept fully this Resolution as it is . It may be , some would like it to be slightly differently worded or the emphasis placed more on this part or on that part . But taking it as a whole , it is a resolution which has already received the full assent of this House , and there is little doubt that it has received the full assent of the country . (Cheers .)

There have been some criticisms of it , notably , from some of the Princes . Their first criticism has been that such a Resolution should not be passed in the absence of the representatives of the States . In part I agree with that criticism , that is to say , I should have liked all the States being properly represented here , the whole of India —every part of India being properly represented here —when we pass this Resolution . But if they are not here it is not our fault . It is largely the fault of the Scheme under which we are functioning , and we have this choice before us . Are we to postpone our functioning because some people cannot be here ? That would be a dreadful thing if we stopped not only this Resolution , but possibly so much else , because representatives of the States are not here . So far as we are concerned , they can come in at the earliest possible moment , we will welcome them if they send proper representatives of the States . So far as we are concerned , even during the last six weeks or a month , we have made some effort to get into touch with the Committee representing the States Rulers to find a way for their proper representation here . It is not our fault that there has been any delay . We are anxious to get every one in , whether it is the representatives of the Muslim League or the States or any one else . We shall continue to persevere in this endeavour so that this House may be as fully representative of the country as it is possible to be .

So , we cannot postpone this Resolution or anything else because some people are not here .

Another point has been raised : the idea of the sovereignty of the people , which is enshrined in this Resolution , does not commend itself to certain rulers of Indian States . That is a surprising objection and , if I may say so , if that objection is raised in all seriousness by anybody , be he a Ruler or a Minister , it is enough to condemn the Indian States system of every Ruler or Minister that exists in India . It is a scandalous thing for any man to say , however highly placed he may be , that he is here by special divine dispensation to rule over human beings today . That is a thing which is an intolerable presumption on any man's part , and it is a thing which this House will never allow and will repudiate if it is put before it . We have heard a lot about this Divine Right of Kings we had read a lot about of it in past histories and we had thought that we had heard the last of it and that it had been put an end to and buried deep down into the earth long ages ago . If any individual in India or elsewhere raises it today , he would be doing so without any relation to the present in India . So , I would suggest to such persons in all seriousness that , if they want to be respected or considered with any measure of friendliness , no such idea should be even hinted at , much less said . On this there is going to be no compromise . (Hear , hear ).

But , as I made plain on the previous occasion when I spoke , this Resolution makes it clear that we are not interfering in the internal affairs of the States . I even said that we are not interfering with the system of monarchy in the States , if the people of the States so want it . I gave the example of the Irish Republic in the British Commonwealth and it is conceivable to me that within the Indian Republic , there might be monarchies if the people so desire . That is entirely for them to determine . This Resolution and , presumably , the Constitution that we make , will not interfere with that matter . Inevitably it will be necessary to bring about uniformity in the freedom of the various parts of India , because it is inconceivable to me that certain parts of India should have democratic freedom and certain others should be denied it . That cannot be . That will give rise to trouble , just as in the wide world today there is trouble because some countries are free and some are not . Much more trouble will there be if there is freedom in parts of India and lack of freedom in other parts of India .

But we are not laying down in this Resolution any strict system in regard to the governance of the Indian States . All that we say is this that they , or such of them , as are big enough to form unions or group themselves into small unions , will be autonomous units with a very large measure of freedom to do as they choose , subject no doubt to certain central functions in which they will co-operate with the Centre , in which they will be represented in the Centre and in which the Centre will have control . So that , in a sense , this Resolution does not interfere with the inner working of those Units . They will be autonomous and , as I have said , if those Units choose to have some kind of constitutional monarchy at their head , they would be welcome to do so . For my part , I am for a Republic in India as anywhere else . But whatever my views may be on that subject , it is not my desire to impose my will on others ; whatever the views of this House may be on this subject , I imagine that it is not the desire of this House to impose its will in these matters .

So , the objection of the Ruler of an Indian State to this Resolution becomes an objection , in theory , to the theoretical implications and the practical implications of the doctrine of sovereignty of the people . To nothing else does any one object . That is an objection which cannot stand for an instant . We claim in this Resolution to frame a constitution for a Sovereign , Independent , Indian Republic —necessarily

Republic . What else can we have in India ? Whatever the States may have or may not have , it is impossible and inconceivable and undesirable to think in any other terms but in terms of the Republic in India .

Now , what relation will that Republic bear to the other countries of the world , to England and , to the British Commonwealth and the rest ? For a long time past we have taken a pledge on Independence Day that India must sever her connection with Great Britain , because that connection had become an emblem of British domination , At no time have we thought in terms of isolating ourselves in this part of the world from other countries or of being hostile to countries which have dominated over us . On the eve of this great occasion , when we stand on the threshold of freedom we do not wish to carry a trial of hostility with us against any other country . We want to be friendly to all . We want to be friendly with the British people and the , British Commonwealth of Nations .

But what I would like this House to consider is this : When these words and these labels are fast changing their meaning and in the world today there is no isolation , you cannot live apart from the others . You must co -operate or you must fight . There is no middle way . We wish for peace . We do not want to fight any nation if we can help it . The only possible real objective that we , in common with other nations , can have is the objective of co -operating in building up some kind of world structure , call it 'One World ' , call it what you like . The beginnings of this world structure have been laid down in the United Nations Organisation . It is feeble yet ; it has many defects ; nevertheless , it is the beginning of the world structure . And India has pledged herself to co -operate in that work .

Now , if we think of that structure and our co -operation with other countries in achieving it , where does the question come of our being tied up with this Group of Nations or that Group ? Indeed , the more groups and blocks are formed , the weaker will that great structure become .

Therefore , in order to strengthen that big structure , it is desirable for all countries not to insist , not to lay stress on separate groups and separate blocks . I know that there are such separate groups and blocks today and because they exist today , there is hostility between them , and there is even talk of war among them . I do not know what the future will bring to us , whether peace or war . We stand on the edge of a precipice and there are various forces which pull us on one side in favour of co -operation and peace , and on the other , push us towards the precipice of war and disintegration . I am not prophet enough to know what will happen , but I do know that those who desire peace must deprecate separate blocks which necessarily become hostile to other blocks . Therefore India , in so far as it has a foreign policy , has declared that it wants to remain independent and free of all these blocks and that it wants to cooperate on equal terms with all countries . It is a difficult position because , when people are full of fear of each other , any person who tries to be neutral is suspected of sympathy with the other party . We can see that in India and we can see that in the wider sphere of world politics . Recently an American statesman criticised India in words which show how lacking in knowledge and understanding even the statesmen of America are . Because we follow our own policy , this group of nations thinks that we are siding with the other and that group of nations thinks that we are siding with this . That is bound to happen . If we seek to be a free , independent , democratic republic . It is not to dissociate ourselves from other countries , but rather as a free nation to co -operate in the fullest measure with other countries for peace and freedom , to co -operate with Britain , with the British Commonwealth of Nations , with the United States of America , with the Soviet Union , and with all other countries , big and small . But real co -

operation would only come between us and these other nations when we know that we are free to co-operate and are not imposed upon and forced to co-operate. So long as there is the slightest trace of compulsion, there can be no co-operation.

Therefore, I commend this Resolution to the House and I commend this Resolution, if I may say so, not only to this House but to the world at large so that it can be perfectly clear that it is a gesture of friendship to all, and, that behind it there lies no hostility. We have suffered enough in the past. We have struggled sufficiently, we may have to struggle again, but under the leadership of a very great personality we have sought always to think in terms of friendship and goodwill towards others, even those who opposed us. How far we have succeeded, we do not know, because we are weak human beings. Nevertheless, the impress of that message has found a place in the hearts of millions of people of this country, and even when we err and go astray, we cannot forget it. Some of us may be little men, some may be big, but whether we are small men or big, for the moment we represent a great cause and therefore something of the shadow of greatness falls upon us. Today in this Assembly we represent a mighty cause and this Resolution that I have placed before you gives some semblance of that cause. We shall pass this Resolution, and I hope that this Resolution will lead us to a constitution on the lines suggested by this Resolution. I trust that the Constitution itself will lead us to the real freedom that we have clamoured for and that real freedom in turn will bring food to our starving peoples, clothing for them, housing for them and all manner of opportunities of progress, that it will lead also to the freedom of the other countries of Asia, because in a sense, however unworthy we have become—let us recognise it—the leaders of the freedom movement of Asia, and whatever we do, we should think of ourselves in these larger terms. When some petty matter divides us and we have difficulties and conflicts amongst ourselves over these small matters, let us remember not only this Resolution, but this great responsibility that we shoulder, the responsibility of the freedom of 400 million people of India, the responsibility of the leadership of a large part of Asia, the responsibility of being some land of guide to vast numbers of people all over the world. It is a tremendous responsibility. If we remember it, perhaps we may not bicker so much over this seat or that post, over some small gain for this group or that. The one thing that should be obvious to all of us is this that there is no group in India, no party, no religious community, which can prosper if India does not prosper. If India goes down, we go down, all of us, whether we have a few seats more or less, whether we get a slight advantage or we do not. But if it is well with India, if India lives as a vital free country, then it is well with all of us to whatever community or religion we might belong.

We shall frame the Constitution, and I hope it will be a good constitution, but does anyone in this House imagine that, when a free India emerges, it will be bound down by anything that even this House might lay down for it? A free India will see the bursting forth of the energy of a mighty nation. What it will do and what it will not, I do not know, that it will not consent to be bound down by anything. Some people imagine, that what we do now, may not be touched for 10 years or 20 years, if we do not do it today, we will not be able to do it later. That seems to me a complete misapprehension. I am not placing before the House what I want done and what I do not want done, but I should like the House to consider that we are on the eve of revolutionary changes, revolutionary in every sense of the word, because when the spirit of a nation breaks its bonds, it functions in peculiar ways and it should function in strange ways. It may be that the Constitution, this House may frame, may not satisfy that free India. This House cannot bind down the next generation, or the people who will dully succeed us in this task. Therefore, let us not trouble ourselves too much about the petty details of what we do, those details

will not survive for long if they are achieved in conflict . What we achieve in unanimity , what we achieve by co -operation is likely to survive . What we gain here and , there by conflict and by overbearing manners and by threats will not survive long . It will only leave a trail of bad blood . And so now I commend this Resolution to the House and may I read the last para of this Resolution ? But one word more , Sir , before I read it . India is a great country , great in her resources , great in her man -power , great in her potential , in every way . I have little doubt that a Free India on every plane will play a big part on the world stage , even on the narrowest plane of material power , and I should like India to play that great part in that plane . Nevertheless today there is a conflict in the world between forces , in different planes . We hear a lot about the atom bomb and the various kinds of energy that it represents and in essence today there is a conflict in the world between two things , that atom bomb and what it represents and the spirit of humanity . I hope that while India will no doubt play a great part in all the material spheres , she will always lay stress on that spirit of humanity , and I have no doubt in my mind , that ultimately in this conflict , that is confronting the world , the human spirit will prevail over the atom bomb . May this Resolution bear fruit and may the time come when in the words of this Resolution , this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind .

**Mr . President :** The time has now arrived when you should give your solemn votes on this Resolution . Remembering the solemnity of the occasion and the greatness of the pledge and the promise which this Resolution contains , I hope every Member will stand up in his place when giving his vote in favour of it .

I will read the Resolution :

This Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent Sovereign Republic and to draw up for her future governance a Constitution :

(2 ) WHEREIN the territories that now comprise British India , the territories that now form the Indian States , and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all ; and

(3 ) WHEREIN The said territories , whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution , shall possess and retain the status of autonomous units , together with residuary powers , and exercise all powers and functions of government and administration , save and except such powers and functions as are vested in or assigned to the Union , or as are inherent or implied in the Union or resulting therefrom ; and

(4 ) WHEREIN all power and authority of the Sovereign Independent India , its constituent parts and organs of government , are derived from the people ; and

(5 ) WHEREIN shall be guaranteed and secured to all the people of India justice , social , economic , and political ; equality of status , of opportunity , and before the law ; freedom of thought , expression , belief , faith , worship , vocation , association and action , subject to law and public morality ; and

(6 ) WHEREIN adequate safeguards shall be provided for minorities , backward and tribal areas , and depressed and other backward classes ; and

(7 ) WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land , sea and air according to justice and the law of civilised nations ; and

(8 ) this ancient land attain its rightful and honoured place in the world and make

its full and willing contribution to the promotion of world peace and the welfare of mankind .

(The Hon'ble the President then read a Hindi translation of the Resolution .)

I have got the Urdu translation also . Unfortunately I am not able to read it . I shall be glad if some other Member could , read it for me .

(Shri Mohanlal Saksena then read the Urdu translation of the Resolution .)

**Mr . President :** I will request Members now to stand in their places and vote in favour of this Resolution .

The Resolution was adopted , all members standing .

**RESOLUTION TO INCLUDE BHUTAN AND SIKKIM WITHIN THE SCOPE OF THE  
NEGOTIATING COMMITTEE**

**Mr . President :** We have got the next resolution relating to Sikkim and Bhutan . Pandit Jawaharlal Nehru will move this .

**The Hon'ble Pandit Jawaharlal Nehru :** Mr . President , Sir , I beg to move the following Resolution :

"This Assembly resolve that the Committee constituted by its Resolution of December 21 , 1946 (to confer with the Negotiating Committee set up by the Chamber of Princes and with other representatives of Indian States for certain specified purposes ) , shall in addition have power to confer with such persons as the Committee thinks fit for the purpose of examining the special problems of Bhutan and Sikkim and to report to the Assembly the result of such examination ."

May I point out , Sir , that the copy of this Resolution that has been circulated should be varied slightly in the penultimate line , to read , "for the purpose of examining the special problems of Bhutan and Sikkim and to report to the Assembly

" .....

The House will remember that we passed a resolution in December last appointing a Committee consisting of Maulana Abul Kalam Azad , Sardar Vallabhbhai Patel , Dr . Pattabhi Sitaramayya , Mr . Shankarrao Deo , Sir N . Gopalaswami Ayyangar and myself to confer with the Negotiating Committee set up by the Chamber of Princes and with other representatives of Indian States for the purpose of —

- (a ) fixing the distribution of the seats in the Assembly not exceeding 93 in number which , in the Cabinet Mission's Statement of 16th May , 1946 , are reserved for Indian States , and
- (b ) fixing the method by which the representatives of the States should be returned to this Assembly , and thereafter to report to the Constituent Assembly the result of such negotiations . Further it was resolved that not more than three other Members may be added to this Committee later . This Committee was to consider two matters , fixing and distribution of seats for States and fixing the method by which the representatives of the States should be returned to the Assembly . The question has arisen as to how we have to deal with certain areas which are not Indian States . In this Resolution before us , Bhutan and Sikkim are mentioned .

Bhutan is in a sense an Independent State under the protection of India . Sikkim is in a sense an Indian State but different from the other . It is not proper to think of Bhutan therefore in the same category as an Indian State . I do not know what the future position of Bhutan might be in relation to India . That is a matter to be determined in consultation and in co -operation with the representatives of Bhutan . There is no question of compulsion in the matter . Now the terms of reference of the Committee you have appointed on the last occasion will not entitle it to tackle any such problem . Those terms are limited to the method of representation in this



Assembly and the distribution of seats . I would like to say that there is some objection raised on the part of the Indian Princes to Negotiating Committee as to why the terms of reference have been so limited by us . They have been limited for obvious reasons —that all the later problems of the Indian States are going to be dealt with by those representatives of Indian States when they come and it would be absurd for us to come to final decisions with regard to the main problems before the representatives are here . Therefore deliberately we limited the functions of our Negotiating Committee . But in limiting them we prevented them from dealing with other problems which may arise in regard to territories which are not Indian States , specially Bhutan and Sikkim , and this Resolution gives them authority to meet representatives of Bhutan and Sikkim and discuss any special problems that may arise . I want to make it clear , on the one hand , that this Constituent Assembly has every right to discuss problems with even Independent States , if necessary . There is nothing to limit our right to discuss our future relations with the Independent States but for the moment I am not dealing with that problem . Whatever the position of Bhutan might be , there is no question that we have the power and authority to deal with their representatives . This is in no way trying to lessen the status of Bhutan's present position . Whatever this may be it will be recognized to be something entirely different , to that of Indian States . We are simply empowering our Committee to deal with the representatives and then to report to this Constituent assembly the result of those negotiations .

I beg to move this Resolution . Sir .

**The Hon'ble Pandit Govind Ballabh Pant** (United Provinces : General ) : I second the Resolution .

**Mr . President** : The Resolution has been moved and seconded . If anyone wants to speak , he can do so ..... (After a pause )..... May I take it that no one wishes to speak about this Resolution ? I will put the Resolution to vote .....

The Resolution was adopted

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**Mr . President** : There are two motions regarding the Budget of the Assembly .

**Mr . H .V Kamath** (C .P & Berar : General ) : May I invite your attention , Sir , to the request made by a large section of this House that as a mark of tribute to Netaji Subash Chandra Bose , whose golden jubilee falls tomorrow , this House shall not meet to -morrow for the transaction of any business ?

**Mr . President** : Mr . Kamath , as I understand , we have not got anything ready for tomorrow ; so , in any case we are going to have a holiday tomorrow . (Cheers ) ..... Mr . Gadgil .

#### BUDGET ESTIMATES OF THE CONSTITUENT ASSEMBLY

**Mr . N .V Gadgil** (Bombay : General ) : I beg to move —

"Resolved that the Assembly do accord sanction to the estimated expenditure of the Assembly for the years 1946-47 and 1947-48 as shown in the attached statements prepared by the Staff and Finance Committee in pursuance of rule 50 (1 ) of the Constituent Assembly Rules ."

Sir , as laid down in the Rules .....

**Sri K . Santhanam** (Madras : General ) : I move that this thing may be taken up in Committee . It is not desirable that we should discuss the Budget in the presence of visitors . So I move that we go into Committee .

**Prof . N .G Ranga** (Madras : General ) : I second it .

**Sri Biswanath Das** (Orissa : General ) : I also support it .

**Mr . Somnath Lahiri** (Bengal : General ) : It deals with public money . I do not see any reason why we should be afraid of discussing in public .

**Mr . President** : Let the motion be moved and then we shall consider whether the consideration will be in Committee .

**Sri K . Santhanam** : The Motion has been moved . He is going to make a speech . Therefore we want it in *camera* . There is nothing to be hidden or to be afraid of but we want to have the freedom to speak freely .

**Mr . President** : I had better then take the sense of the House . Those who want it in Committee form later on will please say 'Aye ' .

**The Hon'ble Mr . B .G Kher** (Bombay : General ) : The whole House may be turned into Committee .

**Mr . President** : Those who are in favour of Committee may say 'Aye '.....  
The motion was adopted .

**Mr . President** : We shall then go into Committee and as the Committee meetings are private , I would request the visitors to withdraw .

(The galleries were then cleared ).

— — —

(The proceedings were then conducted In *camera* ).

<sup>1</sup> English translation of Hindustani speech .

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## Nine Justices in Search of a Doctrine

Thomas I. Emerson  
*Yale Law School*

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## NINE JUSTICES IN SEARCH OF A DOCTRINE

Thomas I. Emerson\*

THE case of *Griswold v. Connecticut*,<sup>1</sup> like few others in recent times, presented the United States Supreme Court with a hopelessly unsupportable piece of state legislation and an unusual variety of possible doctrinal solutions. The Court's response to this situation, and the implications of its choice of doctrine for the future of individual rights in America, make an intriguing study of the judicial process.

The Connecticut law, as a matter of social policy, had little or nothing to be said for it. It was enacted in 1879 and remained as a relic of a Comstockian philosophy which had long since ceased to be widely held, if it ever had been. The statute was at war with all accepted standards of medical practice. It invaded the sacred realm of marital privacy, and for all practical purposes denied to married couples the right of deciding whether or when to have children. Under certain not infrequent circumstances, it imposed upon individuals the cruel choice between sexual abstinence on the one hand and ill health, death, or deformed children on the other. Not generally enforced, indeed unenforceable in most instances, it hung like a cloud over the medical profession. More important, its enforcement only against birth control clinics resulted in patent discrimination against persons who were too poor or too uneducated to seek private medical advice. Its basic purpose was fantastically in conflict with the clearly perceived need to deal with the world's second most critical problem—the population explosion. Even its staunchest supporter, the Roman Catholic Church, was ready to concede that the use of contraceptives by married couples involved a religious principle rather than a public policy to be imposed on all faiths by government sanction. Yet the legislature failed to repeal the statute.<sup>2</sup>

To the ordinary layman, *Griswold v. Connecticut* seemed easy. But to the lawyer it was somewhat more difficult. The lawyer's problem with the case was that the issues did not readily fit into

\* Professor of Law, Yale University.—Ed. The author wishes to point out that he was one of the counsel for appellants in the case of *Griswold v. Connecticut*. This article is written in the capacity of law professor rather than advocate, but the bias should be noted.

1. 381 U.S. 479 (1965).

2. There is some evidence that, at least when the case was in its final stages before the Supreme Court, many Connecticut legislators preferred to have the Court, rather than themselves, make the decision to eliminate the statute.

any existing legal pigeonhole. Actually, there were five possibilities. The case could have been dealt with under the equal protection clause, the first amendment, substantive due process, the right of privacy, or, *in extremis*, the ninth amendment. In order to strike down the statute under any of these doctrines, however, the Court would be forced to enter uncharted waters. Whatever course the Court took, its action was bound to be pregnant with possibilities crucial to the development of the law in a vital area of American life.

### I. EQUAL PROTECTION

The primary equal protection issue arose out of the fact, already mentioned, that although the Connecticut birth control law was a dead letter as far as private physicians and individuals were concerned, it was effectively enforced against birth control clinics. Thus, in actual operation the law did not apply to the private sector of medical practice but did restrict the public sector, thereby discriminating against persons of low income or little education. A subsidiary equal protection issue was that the law, in effect, favored unmarried persons as against married couples. Contraceptives could be legally sold in Connecticut for prevention of disease; faithful partners to a marriage would have no occasion to use them for such purposes, whereas unmarried persons could legally do so. The same factors favored persons engaging in extramarital relations.

Appellants did not rely on the equal protection argument as such, although they did urge it upon the Court as an element of substantive due process. At the very opening of oral argument, however, Mr. Justice Brennan raised the issue, and other Justices indicated their interest in it. Similarly, Mr. Justice White, in his concurring opinion, although proceeding primarily on due process grounds, stressed that "a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment," citing three equal protection cases.<sup>3</sup>

The problem posed is a far-reaching one. The Court has of course employed the equal protection clause, with increasing refinements and elaboration, in the area of race relations. The important question is how much further the Court will go in utilizing this constitutional provision to aid the economically and socially disadvantaged. The Court is steadily moving in that direction. Already it has insisted upon eliminating some of the effects of gross disparity in

3. 381 U.S. at 503. The equal protection cases cited, along with a due process case, were *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

income between defendants caught in the criminal process,<sup>4</sup> it has invoked the equal protection clause to achieve political equality in reapportionment cases,<sup>5</sup> and it has relied upon the clause to protect a business enterprise against economic grudge legislation.<sup>6</sup> As the war against poverty demonstrates, few issues are of more importance to the society of the future than that of assisting its disadvantaged members.

However, the development of equal protection along these lines raises a host of obvious difficulties. It will not be easy to reconcile such equal protection theories with the economic and social laissez-faire assumptions and practices upon which our society has operated over many years and to which it still largely adheres. These uncertainties persuaded counsel for the appellants that there was little to gain in raising bare equal protection issues, as distinct from substantive due process issues, in this litigation. Under the circumstances, the Court, probably wisely, refrained from probing further. However, the interest in the issue evidenced by some members of the Court carries a portent for the future.

## II. THE FIRST AMENDMENT

The first amendment issue was raised by appellants, but it was relatively weak. It was quite evident that appellants had engaged in some conduct—such as giving physical examinations and dispensing contraceptives—which could be classified only as action rather than speech. Their argument conceded this point, but stressed two other factors. First, the aiding and abetting statute, under which appellants were actually convicted, made it a crime not only to “assist” and “abet” another person to commit an offense, but also to “counsel” him to do so. Thus, at least in theory and possible application, this statutory provision swept broadly into the first amendment area. Second, in the conduct of the trial no effort had been made to distinguish between protected areas of speech and unprotected areas of action; everything was mixed together in one grab bag.

The case thus involved two crucial aspects of first amendment theory. One concerns the coverage of the first amendment—the extent to which it protects conduct that is not strictly speech but is essential to the exercise of free speech. The other, closely related, is the problem of separating speech from action in a complex situa-

4. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956).

5. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

6. See *Morey v. Doud*, 354 U.S. 457 (1957).

tion, rather than lumping them together in a way which penalizes speech in the course of regulating action. The Court has come more and more to recognize these problems and has begun to deal with them.<sup>7</sup> In view of the multiplying indirect restrictions upon speech, these questions are bound to become key issues in our effort to maintain a system of freedom of expression.

The birth control case, however, did not present a very favorable opportunity for the Court to press forward on these frontiers. The Court would have had to go beyond anything it had decided before, and it would have had to face some hard problems in determining how far to cut down aiding and abetting statutes and, indeed, much legislation dealing with inchoate crimes. Although the Court refrained from treating first amendment problems directly, first amendment overtones were strongly heard in the prevailing opinion of Mr. Justice Douglas. It would seem clear that any state law applied to prohibit the giving of advice on the value or methods of contraception would fall under the ban of the first amendment. More important, while there is nothing in the opinions on the question of separating speech from action, the Douglas opinion does continue the dialogue on the issue of first amendment coverage.

### III. SUBSTANTIVE DUE PROCESS

Substantive due process issues were central to the case. Not only was the direct argument strongly urged, but due process considerations were also involved in the right of privacy issue, to be discussed later.

The space available here does not permit a detailed analysis of the Connecticut law or its operation, beyond what has already been undertaken. Suffice it to say that a factual demonstration that the law was arbitrary, unreasonable, capricious, and not reasonably related to a proper legislative purpose, did not pose serious difficulties. This feature of the case was the basis for lay optimism over the outcome. The due process argument was facilitated, moreover, by the fact that neither the Connecticut legislature nor the courts had ever fully articulated, much less defended, the objectives of the legislature in enacting the law. Starting from this point, however, there were two aspects of due process which raised significant ques-

7. With respect to the coverage of the first amendment, see *NAACP v. Button*, 371 U.S. 415 (1963). With respect to the separation of speech and action, see *Gibson v. Legislative Investigation Comm.*, 372 U.S. 539 (1963). For a further discussion of these matters, see Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 24-32 (1964).

tions. The first was whether the Court would undertake to elaborate a distinction between the application of substantive due process to cases involving personal rights and its application to cases concerning economic rights. The second involved the question as to what standards of due process are to be employed in considering legislation based not on objective facts related to the public welfare, but rather on grounds of purely moral principle.

A. *Substantive Due Process and the Distinction Between  
Personal and Economic Rights*

In the development of substantive due process, attention has been primarily focused upon cases where the doctrine has been invoked in opposition to economic or social welfare legislation. The earlier cases, in which due process was freely employed to strike down such legislation, are typified by *Lochner v. New York*.<sup>8</sup> However, beginning in the middle thirties with *Nebbia v. New York*<sup>9</sup> and *West Coast Hotel Co. v. Parrish*,<sup>10</sup> the Court sharply shifted direction, and since that time it has been virtually unwilling to listen to the due process argument in such cases.<sup>11</sup> At the same time, there has been developing another line of cases in which due process is utilized on behalf of individual or personal rights. This second line of authority commenced with *Meyer v. Nebraska*,<sup>12</sup> in which the Court held invalid a state statute prohibiting the teaching of the German language to pupils who had not passed the eighth grade, and *Pierce v. Society of Sisters*,<sup>13</sup> in which the Court ruled unconstitutional a law preventing the operation of private schools. The *Meyer* and *Pierce* decisions, in which Mr. Justice McReynolds wrote for the Court, did not distinguish between personal and economic rights, and the decisions in fact leaned heavily upon the need for protecting property rights. Nevertheless, the distinction is implicit.

More recently, the Court has expressly employed the due process doctrine to uphold individual rights in a variety of cases. One example of this approach is *Wieman v. Updegraff*,<sup>14</sup> in which a state loyalty program that penalized innocent membership in a "sub-

8. 198 U.S. 45 (1905).

9. 291 U.S. 502 (1934).

10. 300 U.S. 379 (1937).

11. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Berman v. Parker*, 348 U.S. 26 (1954); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

12. 262 U.S. 390 (1923).

13. 268 U.S. 510 (1925).

14. 344 U.S. 183 (1952).



versive" organization was found to be invalid. Other cases have invoked the doctrines of undue breadth or vagueness, which are mixed concepts of procedural and substantive due process, to strike down similar legislation.<sup>15</sup> In *Aptheker v. Secretary of State*<sup>16</sup> a federal statute denying passports to members of the Communist Party was held unconstitutional on the ground that it was not narrowly drafted to meet a specific evil. Yet the Court has never fully articulated the reasons for the difference in its approach to these two lines of cases.

The distinction is nevertheless a fundamental one. In the *Meyer-Aptheker* type of case, the legislation touches upon fundamental individual and personal rights essential to maintaining the independence, integrity, and private development of a citizen in a highly organized, yet democratic society. In the *Lochner-Nebbia* situation, the legislation deals with economic regulation of commercial and property rights, essential to maintaining the public interest in controlling a highly complex, industrialized society. The distinction is thus basic in striking the balance between public interest and private right in a modern, technologically developed nation.

The Connecticut birth control case would have been an opportune one in which to clarify due process doctrine along the lines indicated. But the Court chose not to rest its decision on straight due process grounds and hence never reached these issues directly. However, there is language in the opinions which indicates that a majority of the Court are ready to apply the distinction. Mr. Justice Douglas stated in the prevailing opinion:

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.<sup>17</sup>

Mr. Justice Goldberg, concurring for himself and Mr. Chief Justice Warren and Mr. Justice Brennan, was even more explicit:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of

15. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960).

16. 378 U.S. 500 (1964).

17. 381 U.S. at 482.

a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196.<sup>18</sup>

Mr. Justice White, alone among the majority, placed his decision squarely upon substantive due process grounds. The opinion is a narrow one, however, taking advantage of a concession made by counsel for Connecticut at oral argument that the sole purpose of the law was to prevent "promiscuous or illicit sexual relationships." Mr. Justice White did not have much trouble demolishing this position, and hence did not find it necessary to enter into more subtle analysis of the due process clause.

Mr. Justice Black and Mr. Justice Stewart did face the issue, however, and explicitly repudiated any distinction between the two types of due process cases. In fact, both Justices went farther, arguing that substantive due process should be limited to the issue of whether the legislation was unduly vague.<sup>19</sup> The majority, it is clear, did not hold either view. It can be expected, therefore, that at some future time the distinction between personal rights and economic rights in the application of due process doctrine will be more fully elaborated.

#### B. *Substantive Due Process and its Relation to Public Morals*

The second significant aspect of substantive due process arose out of the fact that the primary objective of the Connecticut statute, as far as could be determined, was to promote public morality by prohibiting the use of extrinsic devices to prevent conception, even within the marital relation.<sup>20</sup> The enactment was, in other words, designed to compel adherence to a purely moral principle. Thus, to attack such legislation on due process grounds posed a special problem.

When legislation is designed to promote health, safety, or the

18. *Id.* at 497. It should be noted that Mr. Justice Goldberg was applying first amendment and racial-equal protection doctrine to issues of substantive due process.

19. *Id.* at 511-18, 520-24, 528.

20. As noted above, counsel for Connecticut apparently abandoned this position at the oral argument, and Justices White and Goldberg relied upon this concession. Nevertheless, this seems to be the position taken by the Connecticut courts. See *State v. Nelson*, 125 Conn. 412, 424, 11 A.2d 856, 861 (1940).

general welfare in a material sense, its validity under the due process clause can be tested by considerations that can be objectively determined and rationally weighed. The questions whether the statute is arbitrary or capricious, or has a reasonable relation to a proper legislative purpose, turn in such cases upon factual material which can be discovered and presented to the court and upon value judgments which are subject to exposition and debate. The Brandeis brief is, of course, a classic illustration of this approach to the due process clause.

When the legislation is designed to promote public morality, however, the problem of applying the standards of due process may take a different form. In some cases, such as a statute prohibiting prostitution, the moral purposes may be justified by reference to objective and rational factors relevant to the promotion of the general welfare. However, in other cases the legislature may undertake to legislate purely on the basis of moral principles which are not subject to objective evaluation. In such a case, how are the customary criteria of due process to be applied?

Justices Black and Stewart, as indicated above, would not attempt to apply substantive due process standards, other than vagueness, at all. But the other Justices repudiate this approach. Hence they cannot take the position that the simple claim of a moral aim by the legislature satisfies the requirement of due process. Any such a doctrine would immunize virtually all legislation from the mandate of the due process clause. It would allow the legislatures to impose restraints upon individual liberties solely on the ground that some insignificant fraction of the community regarded the issue as a moral one. Yet a law prohibiting women from appearing in public without veils or forbidding women to use lipstick or cosmetics, even though some persons in the community might regard such practices as immoral, would surely be held an arbitrary infringement of personal liberty outlawed by the due process clause. What, then, should be the constitutional standards for applying the due process clause in cases where the legislature seeks to promote public morals?

Counsel for appellants argued that the standard in such cases should at least be that (1) the moral practices regulated by the statute must be objectively related to the public welfare, or (2) in the event no such relationship can be demonstrated, the regulation must conform to the predominant view of morality in the community. In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot

enforce the morality of a minority group upon other members of the community. The obscenity cases were cited as supporting a somewhat similar doctrine. It was further suggested that the first standard set forth above would be sufficient in itself, without the second. That is, if the moral principles cannot be objectively related to the public welfare, the legislation fails, for that reason alone, to meet the standards of due process. However, it was pointed out that it was not necessary to take this position in order to decide the case then before the Court.

Mr. Justice Stewart, although not meeting this argument squarely, apparently considered and rejected it.<sup>21</sup> The other Justices did not refer to it. Obviously the problem raises crucial but controversial questions respecting the relation of law and morals. The Court was not willing to venture into such a delicate area. Perhaps one cannot blame them.

#### IV. NINTH AMENDMENT

The ninth amendment issue was not raised at the trial by the appellants, and was urged in the Supreme Court only as one source of the right of privacy. However, to the astonishment of many observers, five of the Justices accepted the invitation to consider the ninth amendment as a basis for invalidating the Connecticut statute. Mr. Justice Douglas invoked it as one of the constitutional guarantees from which the right of privacy was derived. Mr. Justice Goldberg discussed it at length, but his opinion seems to give it a more limited significance. He expressly repudiated the argument that the ninth amendment "constitutes an independent source of rights protected from infringement by either the States or the Federal Government."<sup>22</sup> Rather, his position was that "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."<sup>23</sup> The specific rights must therefore still be derived from other sources.

The fact that a majority of the Supreme Court, for the first time, relied upon the ninth amendment in any serious way to strike down state legislation is an event of considerable importance. Yet there remains grave doubt that the ninth amendment has a significant future. Mr. Justice Goldberg's formulation does not seem to open

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21. 381 U.S. at 530.

22. *Id.* at 492.

23. *Ibid.*

any really new possibilities. The doctrine that the due process clause protects certain fundamental rights not expressly mentioned in the Bill of Rights or elsewhere in the Constitution is well established, and has been utilized on many other occasions.<sup>24</sup> Mr. Justice Douglas' use of the ninth amendment carries a greater potential. Under his theory, the ninth amendment might be utilized to expand the concept of privacy or, perhaps, to guarantee other basic rights. It would hardly be surprising, however, if this development were some decades away.

## V. THE RIGHT OF PRIVACY

Since no constitutional "right of privacy" had previously been recognized, at least as an independent doctrine, in order to dispose of the case on this ground it was necessary to establish a new constitutional concept. This involved three major problems. One was to determine the source from which the new doctrine was derived, a second was to indicate the standards by which the doctrine would be applied, and the third was to suggest, if only tentatively, the scope of its application.

### A. *The Creation of the Right*

With respect to the initial problem of determining the source of the right of privacy, there were two approaches available. The first was to argue that, although the Constitution nowhere refers in express terms to a right of privacy, nevertheless various provisions of the Constitution embody separate aspects of such a concept, and the composite of these protections should be accorded the status of a recognized constitutional right. This approach was adopted in the prevailing opinion of Mr. Justice Douglas: "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>25</sup> From the first amendment, the third amendment, the fourth amendment, the privilege against self-incrimination of the fifth amendment, and the ninth amendment, he concluded that "the right of privacy which presses for recognition here is a legitimate one."<sup>26</sup>

The second approach starts from the position that the due process clause of the fourteenth amendment, whether or not it incorporates some or all of the provisions of the Bill of Rights, guarantees

24. Mr. Justice Goldberg himself cites, among other cases, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

25. 381 U.S. at 484.

26. *Id.* at 485.

such basic rights as are "implicit in the concept of ordered liberty." The right of privacy can be considered such a fundamental right and hence protected under the due process clause. This view of the matter was taken by Mr. Justice Harlan in his concurring opinion.<sup>27</sup>

Mr. Justice Goldberg, in his opinion joined by the Chief Justice and Mr. Justice Brennan, seems to have combined both approaches. He expressly accepted Mr. Justice Douglas' view that a right of privacy was "protected, as being within the protected penumbra of specific guarantees of the Bill of Rights."<sup>28</sup> However, he also pointed out that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."<sup>29</sup> He, too, went on to find that the right of privacy was a fundamental right.

The precise source of the right of privacy is not as important as the fact that six Justices found such a right to exist, and thereby established it for the first time as an independent constitutional right. It was a bold innovation. Yet it was not entirely without precedent. The Court had previously recognized a somewhat similar "right of association" derived from the various specific guarantees of freedom of speech, press, assembly, and petition in the first amendment.<sup>30</sup>

In any event, the creation of a right to privacy is a step with enormous consequences. The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector—protection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

27. *Id.* at 500. Mr. Justice Harlan's views are stated at greater length in his dissenting opinion at a prior stage of the litigation. See *Poe v. Ullman*, 367 U.S. 497, 522 (1961).

28. 381 U.S. at 487.

29. *Id.* at 486.

30. See the line of cases beginning with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), collected in *Emerson*, *supra* note 7, at 6-15.

### B. *Standards of Application*

Having established the constitutional right of privacy, the Court was confronted with the second problem—determination of the standards by which the new doctrine would be applied. Mr. Justice Douglas dealt with this question somewhat summarily. He noted that the Connecticut law, "in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon [the marriage] relationship."<sup>81</sup> He mentioned specifically the problem of actual enforcement, of allowing the police "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."<sup>82</sup> He also applied the rule against undue breadth: "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"<sup>83</sup>

The Goldberg opinion proceeded in a somewhat different direction. It took as its primary standard a balancing test, but one which placed a heavy burden of justification upon the government: "[T]he State may prevail only upon showing a subordinating interest which is compelling."<sup>84</sup> Mr. Justice Goldberg also reiterated the Douglas position that the law must not "sweep unnecessarily broadly," and added that other Connecticut laws on adultery and fornication "demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.'"<sup>85</sup>

While the Court is thus not settled upon the exact formula by which to determine whether the right of privacy has been infringed, it would seem clear that the test is more severe than that applied in substantive due process cases involving economic regulation. On the other hand, in view of the newness of the constitutional right, the vagueness of the concept, and the general lack of precise standards, it would appear that there is little prospect of working out any such strict test as has been proposed for first amendment cases. It is most likely that future decisions will follow the Goldberg ap-

81. 381 U.S. at 485.

82. *Ibid.*

83. *Ibid.* Mr. Justice Douglas had previously elaborated his views in *Poe v. Ullman*, 367 U.S. 497 (1961), where he had also stressed primarily the impact of enforcement activities upon marital privacy.

84. 381 U.S. at 497.

85. *Id.* at 497-98.

proach—a balancing of factors, with the government required to show a “compelling interest,” supplemented by doctrines of undue breadth, vagueness, and the feasibility of alternative measures.

### C. *The Scope of the Right*

With respect to the third problem—the scope of the right of privacy—the Court proceeded with its customary caution when venturing into new fields. The facts of the case before it, although strong, embraced a relatively narrow area. They were confined to a use statute, discriminatory in operation, which had been applied to married couples. The Douglas opinion, to the extent it deals specifically with the scope of the right to privacy, treats only of the “marriage relationship.” The Goldberg opinion is also addressed to the “right of marital privacy,” although it does refer to the privacy of “the marital home” and the right “to marry and raise a family.” It is conceivable that in future cases the Court will limit the doctrine to the marriage relationship, or even refuse to extend it beyond the precise facts of the Connecticut case. However, such an outcome seems unlikely, since constitutional doctrines have a way of expanding beyond the boundaries of the original case. This is especially true where, as here, the right established is one which responds so acutely to the growing needs of the society. It is impossible to foretell, of course, what the future course of development may be. But it is not hard to anticipate some of the claims that will be pressed upon the Court in the coming years. And any appraisal of the significance of the Court’s action in the Connecticut case demands some speculation, however brief and uncertain, concerning the Court’s response.

One series of issues revolves around the same aspect of the right to privacy as that involved in *Griswold*—the marital relationship. It would seem reasonably clear that other laws attempting to prohibit certain kinds of sexual activity by married couples, such as so-called acts of “perversion,” requiring a type of enforcement similar to that implicit in the Connecticut statute, would fall under the ban against invasion of privacy. Less clear, however, is the fate of state laws regulating not the use of contraceptive devices, but their manufacture, sale, or distribution. Plainly, many forms of regulation—such as those designed to safeguard health or safety, or requiring distribution through physicians or licensed drug stores—would be upheld. But would an attempt by the state to enforce a total prohibition of access to contraceptives by married couples, such as the



Massachusetts statute,<sup>36</sup> constitute an invasion of the right of marital privacy? In this situation, the nature of the right is not coterminous with that protected in the *Griswold* case. It no longer involves those aspects of police enforcement which loomed so large under the Connecticut statute. Rather it consists primarily in the right to have or not have children, and to plan a family. In view of Mr. Justice Goldberg's inclusion of the "right to marry and raise a family" within the right of privacy, and in view of the fundamental nature of such a right, it would not be surprising if the Court accepted such a claim.

If this supposition is accurate, then the corollary would seem to follow that action by the government to compel limitation of births, at least in the absence of special compelling circumstances, would also constitute an invasion of privacy. Indeed, Mr. Justice Goldberg stated this as an *a fortiori* proposition. The new doctrine thus carries serious implications for sterilization laws and future birth control programs. Undoubtedly the government could encourage birth control by many means other than strict compulsion, but a line between encouragement and coercion would have to be worked out. On the same view of the scope of the right to privacy, the way would be open for an attack upon significant aspects of the abortion laws.

An additional area in which claims to the right of privacy are likely to be invoked embraces the multitude of existing laws relating to sexual conduct outside the marital relation. It seems unlikely that the Court would disturb most of the legislation relating to adultery, fornication (commercial or otherwise), and homosexuality. Indeed, Justices Goldberg and Harlan expressly disclaimed any such intention. However, some of the particularly arbitrary, irrational, or unenforceable aspects of such legislation might be vulnerable. It is conceivable that sometime in the future, as mores change and knowledge of the problem grows, all sexual activities of two consenting adults in private will be brought within the right of privacy.

Apart from sex laws, it would not be surprising to see the concept of privacy employed in a number of other situations to safeguard the private sector of our lives from government encroachment. One obvious area in which this concept is sure to be pressed and may well be successful, at least in part, is electronic eavesdropping. The scientific possibilities are so fantastic and the invasion of privacy

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36. MASS. GEN. LAWS ch. 272, § 21 (1932).

so devastating that it is hard to believe a civilized society will not feel compelled to throw up some protection to individuals. This may come about through legislation, but the constitutional right of privacy could also play a significant role.<sup>37</sup>

Other such areas also come to mind. Various kinds of police practices, not technically covered by the search and seizure guarantees of the fourth amendment, would easily fall within an expanding concept of the right to privacy.<sup>38</sup> Efforts by government officials to compel the production of private information through legislative committees, lie-detector tests, or other similar means may gradually be brought within the constitutional doctrine. Release of official records of arrests not resulting in conviction might be curtailed. Finally, the whole field of social welfare legislation and administration may be forced into procedures and practices more compatible with human dignity and integrity. Thus, restrictions imposed by official or semi-official welfare agencies upon the private life or activities of welfare recipients may well become subject to the new guarantees of privacy.<sup>39</sup>

The foregoing observations are merely indicative of some of the areas that may be encompassed within an expanded concept of the right to privacy. Undoubtedly the Court will proceed slowly, developing the right to privacy on a case-by-case basis. The essential point is that the key constitutional doctrine has been enunciated, and many forces in our society will press hard toward fuller realization of its great potential.

## VI. CONCLUSION

What, then, are we to conclude about the Court's performance in the birth control case? On the whole, the Court's choice of the privacy doctrine as the basis of its decision seems sound. Unprecedented as it was, and as broad and ill-defined as it remains, the doctrine still represents the narrowest and most precise formula available, and the one most relevant to the issues presented. This

37. See, e.g., Judge Washington's dissent in *Silverman v. United States*, 275 F.2d 173, 178 (D.C. Cir. 1960).

38. It should be noted that to the extent specific activities of government officials are held to violate the constitutional right of privacy, they may be subject to criminal prosecution and civil redress under federal civil rights legislation. See, e.g., *York v. Storz*, 324 F.2d 450 (9th Cir. 1963), holding that allegations that police officers took photographs of a woman complainant in the nude and distributed them among their fellow officers stated a cause of action under REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

39. See Reich, *Individual Rights and Social Welfare—The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

creation of a new constitutional protection meets a critical need of society, and the new doctrine seems to have a viable and significant future.

The Court will undoubtedly be attacked upon the broader ground that, since the objections to the Connecticut law did not fall clearly within any established and specific legal category, the Court should not have invalidated the law at all. Supporters of the argument for "neutral principles" can hardly be satisfied that the creation of a new principle conforms to their view of the Court's function. Furthermore, the concern of Mr. Justice Black, forcefully expressed in his dissent, that more is to be gained by strict adherence to specific provisions of the Constitution than by excursions into the realm of "natural law," cannot be discarded lightly. Yet it is significant that Mr. Justice Harlan, the most ardent advocate of judicial self-restraint now on the Court, joined in the establishment of the new constitutional right to privacy. This indicates that, in the context of the case before it, the claim to constitutional protection presented could not readily be thrust aside. In any event, the role of the Court as guardian of individual rights has been both solidified and advanced.

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Tagore Lectures  
ON  
LIMITED GOVERNMENT  
AND  
JUDICIAL REVIEW

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## LECTURE II

### THE PROBLEM OF POWER AND NEED FOR LIMITATIONS

The perennial problem of the Individual is the problem of POWER. Few will contest that for an organised living, collective power has to be vested in some authority, but the question remains—where and to what extent?

The Leviathan to whom, according to Hobbes, the individual was to surrender his natural rights in order to buy social security and peace, was a single-headed Crowned monster, as portrayed in the frontispiece of his work (1651).<sup>1</sup> The history of constitutionalism in England is a history of transference of power from that single-headed Leviathan to a hydra-headed uncrowned Leviathan.

The genesis of this movement may be traced to a statute<sup>2</sup> passed in England by the Rump of the Long Parliament to abolish the office of the King, in the year 1649, i.e., at the very time when Hobbes was, in all probability, writing his thesis:

"And whereas it is and hath been found by experience that the office of a King . . . is unnecessary, burdensome and dangerous to the liberty, safety and public interest of the people, and that for the most part use hath been made of the legal power and prerogative to oppress and impoverish and enslave the subject . . . be it, therefore, enacted and ordained . . . that the office of King shall not henceforth reside in or be exercised by one single person . . ."<sup>3</sup>

As to what England has installed in place of the single-headed Leviathan, the best testimony comes from Prof. A. V. Dicey,<sup>4</sup> the illustrious spokesman of Parliamentary sovereignty, who, writing in 1885, said that—

- (a) Parliament has the right to make or unmake any law whatever; and
- (b) No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

But the problem of POWER remains, whether it is vested in one person or a group of persons. Society was needed for the caveman to escape from constant fear and lawlessness but if, as Lord Acton<sup>5</sup> said,

"Power tends to corrupt and absolute power corrupts absolutely",

it is inevitable that, sooner or later, even a collective body will forget, that Society exists for the Individual and not the Individual for Society. In these days of multifaced social control

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of the individual from his birth to death, it is well worth to recall this nearly-forgotten starting point of human civilisation.

The honesty and integrity or popularity of the men at the helm of affairs, for the time being, is no answer to the problem, for nobody knows who will come to power tomorrow. If an enduring solution is to be found for a problem rooted in human nature itself, we must reduce the alluring glitter of the apple in the Garden of Eden by shrouding it with limitations, and that is the solution offered by the doctrine of limited government.

Historically, the falsity of the assumption that a Legislature cannot do any wrong was demonstrated by the attitude of the English people sitting in Parliament towards their own brethren beyond the seas,—the American colonists,—in insisting on its right to impose taxes without the consent of the people to be taxed.<sup>5</sup>

Commenting upon this strange behaviour of the British Parliament towards the Colonists, a learned author<sup>6</sup> has observed—

"Misinterpreting the real nature of the English revolution, a few misguided (statesmen) in the eighteenth century tried in the case of Englishmen overseas to violate political traditions which they would never have dared to touch at home. The loss of a great colonial empire was the result."

Even a representative Legislature is nothing but a group of men, who are liable to act under momentary passions. The theory of limited government, therefore, arises out of a refusal to have absolute faith in men. As Marshall explained it—

".....the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment;.....the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."

That, in the absence of legal limitations, the sovereignty of a representative Legislature may prove to be "a despotism of the majority"<sup>7</sup> was not an apprehension peculiarly to American Colonists but has also been realised by members of the existing British family. Speaking in 1961, an eminent Scotsman has said<sup>8</sup>—

"Even in England to-day, however, it may have been realised—from a study of party politics—that the dictatorship of a legislative majority could establish a tyranny of the legislature or of the executive. A legislature as such is not beyond reach of the corrupting effects of power. An all-powerful legislature may be most exposed to that danger. Liberty involves, not only freedom under the law, but also in some matters freedom from the lawmaker".<sup>9</sup>

It is not that the worshippers of Parliamentary absolutism could never imagine the possibility of its being used to enslave the subject as the absolute Monarch had done. But Dicey, a

legalist as he was, advised us that no legal checks upon Parliamentary omnipotence was necessary since there were two limitations inherent in any human authority:

Fallacy of the Dicean assumption as to subjective limitations.

(a) The one was the fear of popular resistance to unpopular laws.<sup>12</sup>

Does it mean that, if the general Election is not near at hand, the people of England shall have to bear with oppressive laws made by a capricious Parliament, unless they can organise a rebellion strong enough to dethrone the majority of some 630 members or to court imprisonment in a mass campaign of civil resistance (which is known in India as *Satyagraha*<sup>13</sup>) to the unpopular laws until the Government is exasperated enough to withdraw them? If it means that the party in majority will be deterred from making unjust laws by the fear of a defeat in Parliament, such restraint will be little more than illusory where the party in power has been returned with a clear majority, because in such cases the party machinery may be safely relied upon to carry the government in power up to the next General Election despite anything short of a revolution. However one might disagree with the conclusions arrived at by *Rousseau*,<sup>14</sup> his observation about the English political system holds good even after two centuries:

"The English people thinks itself free; but it is greatly mistaken; it is free only during the elections for members of Parliament; so soon as they are elected the people is enslaved and becomes a *zelo*."<sup>15</sup>

(b) The other limitation, according to *Dicey*, is the limitation inherent in human character and capabilities, which would restrain a legislative assembly as well.

In support of his thesis on this point, *Prof. Dicey*<sup>11</sup> quotes *Leslie Stephen*<sup>12</sup> saying—

"If a Legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; But legislators *must go mad* before they could pass such a law, and subjects be idiotic before they could submit to it."

Are you then to rest complacent with the consolation that an assembly of men cannot go mad? What are you to do, if they do not go mad but simply become crazy; if they do not chase blue-eyed babies but make a man a judge in his own cause,<sup>13</sup> or bar your right to bring a justiciable grievance before a court of law<sup>14</sup> or decide that cause itself, e.g., to give the property of A to B;<sup>15</sup> or terminate the employment of an employee, on an allegation of misconduct, by a legislative decree,<sup>16</sup> or authorise the Executive to deprive you of the enjoyment of your property<sup>17</sup> or to revoke your professional

Fallacy of the Dicean assumption that Parliament cannot err.

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licence,<sup>18</sup> without a hearing; or enable the Government to oust private individuals from a business, not for the purpose of creating a State monopoly, but for creating a monopoly in favour of a particular class of people?<sup>19</sup>

The real reason why Parliamentary sovereignty still subsists in Britain, notwithstanding that many of the *Dicey* dogmas have been eroded by the waves of Time, is not the external and internal limitations envisaged by *Dicey* but the faith of most Englishmen that the safeguard against Parliamentary absolutism lies in the ballot-box. The faith in the goodness of the members of Parliament is, in fact, nothing but a faith in majority government. The assumption is that the errors of the party-in-power will be corrected at the next Election. But there are loopholes in this assumption even under ideal conditions:

The *first* is that the electoral verdict can be available only at long intervals. The *second* is that the succeeding Government cannot be expected to go into every clause of the statute-book to remove what might seem to them repugnant to 'common right and reason'.<sup>20</sup> *Thirdly*, there is the question of the minority or minorities. Representative government by the majority is, no doubt, the only practicable political system in a modern State. But is it also indispensable for the functioning of a true democracy that during the regime of one party in the majority for the time being, all outside that party must have to suffer even on justiciable causes because the wrong is sanctioned by a law made by a Parliament which itself goes against 'common right and reason'?<sup>21</sup>

Strangely enough, the likelihood of such legislation being carried through increases in a 'Welfare State', where the emphasis on projects aiming at the collective welfare is bound to be at the cost of private rights of some individuals. Take, for instance, a question which was recently mooted in Britain during the Labour regime,<sup>22</sup> namely, whether the opportunity of a property owner to object to a planning scheme should not be eliminated to ensure a speedier realisation of social welfare. In pursuance of this move, Parliament enacted the Land Commission Act, 1967. The normal procedure under this Act (s. 7) is to give an opportunity to an affected individual to object to a compulsory purchase order, leading to a public inquiry. But all this may be dispensed with, except in a few specified cases, if "it appears to the appropriate Minister that it is necessary in the public interest". It is evident that it is open to a Minister, in the exercise of his subjective consideration, to determine, whether, in a given case where a land is required for 'material development', the affected owner should be heard or not.



If such a legislation were undertaken in India, to-day, it would have been open to challenge in the Court on the ground of contravention of Art. 14, for having conferred upon the Executive unguided discretionary power to discriminate between different owners to be affected by compulsory purchase.

What follows is that where the matter is left finally to the determination of the Legislature, the shape of the legislation will depend exclusively on the views of the party in power and the quantum of pressure that individuals and collective organisations who are likely to be affected by the scheme can bear upon the ruling party. From the resultant determination, the individual affected shall have no right to resort to a court of law to subject the offending provisions to the scrutiny of an impartial, non-political tribunal, as to whether fundamental norms of justice and fair play are being denied to the expropriated private owner.

That it is not impossible or unimaginable for the British Parliament to legislate even at home against 'common law and reason' is testified by the decision of Coke,—a most celebrated Chief Justice England has so far produced,—in *Bonham's*

*Bonham's case* (1610). <sup>case</sup> An Act of Parliament, confirming the Charter of the Royal College of Physicians, gave the incorporated society of physicians power to impose fines upon members offending against its rules, and half of the fine so realised would go to the Crown and the other half to the society itself. Dr. Bonham, who was imprisoned for non-payment of a fine so imposed by the society, brought an action for false imprisonment. The Court, presided over by Chief Justice Coke, decreed the action, holding that the Act was void inasmuch as it had made the society, which was interested in a share of the fine, a prosecutor and judge at the same time, which was against common law and reason. Here was enunciated the indisputable principle of natural justice that 'one cannot be Judge and Attorney for any of the Parties', or that a person cannot be a Judge in his own cause. The question before the Court of King's Bench was what happens if a law of Parliament, unfortunately, makes a man a Judge in his own cause, violating such an elementary principle of justice? Coke asserted that such a law could be subjected to judicial review and adjudged void by the Court. This view was reiterated by the next Chief Justice Hobart, in 1615.<sup>23</sup> Nevertheless, there were people in England who considered Coke, Chief Justice, as a heretic for this decision of his but none in the United States or India would share that opinion.

The most curious feature of this attitude of the English people on the present matter is that if a judge, who is interested

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in a cause, does take part in its adjudication, there would be a universal condemnation of such act on the part of the judge and a competent court would set aside such decision on this ground, in an appropriate proceeding. But if Parliament authorises such an act, there would be no tumult and even the courts of law would be silenced.<sup>24</sup>

As a crucial instance of condemnation of the act of a judge deciding a cause in which he was interested, though rather remotely, no better illustration can be offered than that of a Lord Chancellor who, as you know, is the most powerful dignitary in the world of democratic government, in that he is the head of the Judiciary, the Chairman of the House of Lords as a legislative body and an important limb of the Executive, being a member of the Cabinet. The facts, in short, in the case of *Dimes v. Grand Junction Canal Co.*<sup>25</sup> of which I am speaking, were as follows:

A public company in which the Lord Chancellor had a share, bought some land for making a canal. A dispute as to this transaction came up to the House of Lords and the title of the company was decreed, with an injunction, by the House, presided over by Lord Cottenham, as the Lord Chancellor. This decree was later challenged as being vitiated "on account of the interest" which Lord Cottenham had in one of the parties to the cause, namely, the company, and the matter came up before a future House of Lords and the question of law, being referred to the Judges of the Queen's Bench, the latter gave the opinion that the decree should be quashed on account of the alleged interest of Lord Cottenham, and it was so quashed by the House of Lords, acting on that opinion. The observations of Lord Campbell, of the Queen's Bench, in support of the opinion are worth remembering:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, . . . it is of the first importance that the maxim that no man can be a judge in his own cause should be held sacred. . . . we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took part in the decision: And it will have a most salutary influence on those tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that *his decree was on that account a decree not according to law*, and was set aside. This will be a lesson to all inferior tribunals to take care that not only in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence. . . ."

Coming now to such act being authorised by Parliament itself,—that the vice Coke protested against in *Bonham's Case*<sup>26</sup> has not died, or his logic has not been exterminated, with his dismissal in 1616, is evidenced even by contemporary legisla-

tion in Britain. The English Licensing Act of 1953 provides [s. 48 (5)], *inter alia*, that the decision of a licensing justice shall not be invalid merely because he is interested in the disputed premises. That the English Courts are helpless when Parliament itself makes such a provision is demonstrated by the judgment in *R. v. Barnsley Licensing JJ.*<sup>26</sup> The reason is that since the self-abnegating pronouncement of Willes J. in *Lee v. Budé & Torrington Jn. Ry. Co.*,<sup>27</sup> in 1871 that—

"It was once said that if an Act of Parliament were to create a man judge in his own cause, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. . . . Are we to act as *relents* over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. . . ."

" . . . we do not sit here as a court of appeal from parliament. . . . If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it."<sup>28</sup>

courts in England have never claimed the power to invalidate an Act of Parliament on any ground whatever, however monstrous it might be.

But if a provision such as that in the English Licensing Act, 1953 were impugned before a Court in India, the circumstances under which Parliament had been persuaded to make such an odd provision would be examined by the Court, and, in the absence of any extraordinary circumstances to justify the violation of such an elementary principle of natural justice, the statutory provision would be condemned as an unreasonable restriction upon the freedom of business guaranteed by Art. 19 (1) (g) of the Constitution.<sup>29</sup>

I shall further illustrate my foregoing observations as regards the fallacy of the assumption of legislative infallibility and the need for imposing constitutional limitations on legislative power.

Need for Fundamental Rights as limitations on legislative power.

I. It is patently anomalous that the freedom of speech and expression which has been held in the United States to be the very "foundation of free government"<sup>30</sup> and "the matrix . . . of every other freedom"<sup>31</sup> is not guaranteed to the individual against legislative encroachment in England. To say that a citizen has a right to speak or write whatever he chooses provided the law is not infringed<sup>32</sup> is but an *innuendo* for the truth that any speech or writing may be made illegal and punishable by Parliament only if it chooses to do so.

Now, it is a common law misdemeanour in England to publish a 'seditious libel' which may be committed, *inter alia*, by making an utterance which 'brings into hatred', or excites

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disaffection' against, "the government of the United Kingdom as by law established".<sup>32</sup> If the interpretation given by the Judicial Committee<sup>33</sup> to similar expressions in an Indian statute be applied by a Court in England, it would be an offence in England to criticise a Minister, even if it is not attended with any violence against the State.

Of course, English Courts have modified the rigours of the common law by discouraging prosecutions on a charge of seditious libel unless there is an incitement to violence.<sup>34</sup> But the width of the common law definition, as given in authoritative treatises, still remains so that, as *Dicey* points out, it can be easily "used to check a great deal of what is ordinarily considered allowable discussion".<sup>35</sup> What is important in the present context is that it is possible for the Judges to change their view on the basis of the existing definition; and what is more, if Parliament overrides the view taken in *R. v. Aldred*,<sup>34</sup> by enacting that an offence of seditious libel can be committed without any incitement to violence, English courts would be powerless. In this connection, it would not be irrelevant to mention to what uses the law of seditious libel had been put in earlier days. In the words of *Hude & Phillips*,<sup>36</sup>—

"In the past prosecutions for libel were a powerful weapon in the hands of Governments in the eighteenth century to stifle opposition. . . . So long . . . as the law remains unaltered there is the possibility of a revival of the severity of its administration, against which the unwillingness of juries to convict is a principal safeguard."

Instances of such legislative provision can indeed be had from elsewhere. It is a paradox of American constitutional history that within a decade of the inauguration of the Republican Constitution and shortly after the adoption of the First Amendment to guarantee the freedom of speech and of the press, it was the youthful Congress which, in defence of the national leaders in power, enacted the Sedition Act of 1798, penalising defamation of the President and members of the Government or of Congress. The constitutionality of this statute could not, of course, be tested in the courts because the first and the only victims of this statute were discharged by President Jefferson. But if such a statute were challenged before the American Supreme Court, it is sure to have been annulled on the ground of violation of the constitutional guarantee of the freedom of expression and the Court has, in fact, held<sup>37</sup> in other contexts, that the freedom of speech guaranteed by the First Amendment can be abridged only where the established order is sought to be overturned by means of violence and

that mere personal criticism or defamation of any person in office, however high it may be, cannot be punished as an offence against the State.

To remove any doubts, the Supreme Court has, in 1964, definitely ruled that the First Amendment would not tolerate any form of restraint upon 'criticism of government and public officials.'<sup>27a</sup>

".....the presence or absence in the law of the concept of seditious libel defines society.....If.....it makes seditious libel an offence, it is not a free society no matter what its other characteristics."

Coming to *India*, we find the common law misdemeanour of seditious libel codified in s. 124A of the Indian Penal Code,—a statute enacted by British Rulers, in 1860. Any attempt to excite hatred, contempt or disaffection "towards the Government established by law in India" is punishable as Sedition, under this section, which falls under the group of 'offences against the State'. The Judicial Committee of the Privy Council consistently held that the offence of sedition was *not* dependent upon any tendency to cause violence, that 'Government established by law' included the individuals constituting the governmental body for the time being and that 'disaffection' simply meant 'absence of affection', so that any disparaging criticism of a Minister or other member of the Government was punishable under this section, without more.<sup>28</sup>

But the Constitution of India has guaranteed the freedom of speech and expression to every citizen, by Art. 19, cl. (1)(a). This freedom could be curtailed by the Legislature only if the restrictions imposed were 'reasonable' and they were made in the interests of any of the several specified grounds for social control, such as security of the State, public order and the like. Prior to the adoption of the Constitution, no question of the constitutionality of s. 124A could possibly arise. But it came up, in 1942, before the Federal Court, which held,<sup>29</sup> overruling the view taken by the Privy Council, that the gist of the offence was "public disorder or the reasonable anticipation or likelihood of public disorder".<sup>30</sup> Affirming this view, the Supreme Court has, in the later case of *Kedar Nath*,<sup>31a</sup> observed that if the wide interpretation given by the Privy Council were to be applied, the section would contravene the guarantee of Art. 19(1)(a), for, in the absence of a breach of public order, the restriction imposed by the section could not be justified as a valid restriction of the freedom of speech 'in the interests of public order or of security of the State'. The result of this decision is that the spreading of disaffection against the members of the Government, without more, which was a limitation upon the individual's freedom

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of speech and expression for more than a century in India, has ceased to be so, notwithstanding that the statute, based on English common law, provides otherwise. Though the statutory provision has not been struck down directly the decision, in substance, effects a partial invalidation of the provision and a restoration of the individual's freedom by the intervention of judicial review.

Similarly, in *England*, liberty of the press was never asserted as a safeguard against legislative encroachment, and Parliament is competent to restrict it by a law in the same manner as it can restrict the freedom of a 'letter-writer'.<sup>25b</sup>

The reason is that, historically, the struggle in the cause of the press was a struggle against the licensing authority constituted under the Licensing Act of 1943<sup>25c</sup> and subsequent statutes but could ever think of challenging the constitutionality of the Act, until Parliament itself decided to allow the annual Act to expire, in the year 1695.

In the *United States*, on the other hand, the First Amendment to the Constitution specifically guarantees the freedom of the press and that guarantee is couched in the form of a limitation upon the Legislature:

"The Congress shall make no laws.....abridging the freedom.....of the press".

In the result, the Courts have been in a position to strike down many a statute not only on the ground that it imposes a pre-censorship<sup>25d</sup> but also on the ground that it imposes unreasonable restrictions, direct or indirect, upon the freedom of the press.<sup>25e</sup>

It is gratifying to note that, even in the absence of a separate guarantee of the freedom of the press in the Constitution of India, our Supreme Court has not only asserted it as included in the 'freedom of speech and expression' guaranteed by Art 19(1)(a), but also struck down laws imposing direct or indirect restrictions upon the freedom of the press which cannot be justified as 'reasonable'.<sup>25f</sup>

II. I shall now take up an instance of a right, which is safeguarded in India by the Constitution, but has been sought to be ensured in *England* by legislation,—to point out the difference.

All profession of equality and fraternity in the West has been reduced into a mockery by the violent outbreaks of racial hatred in the *United States and in the United Kingdom*. After much controversy,

Racial Discrimination

the British Parliament has been induced to enact the Race Relations Act, 1965, which makes it an offence to practise racial discrimination at places of public resort. But if, under the pressure of the mob, the present Government or its successor is obliged to repeal or abridge this statute, courts would be powerless against such legislation.

In India, on the other hand, any legislation permitting such discrimination, in any form, would be struck down by the Courts, as violative of Art. 15 (2) of the Constitution, which includes immunity against racial discrimination in public places as a fundamental right guaranteed by Part III of the Constitution.

III. There are certain notions of 'common right and reason' which even an English Court will not allow the Legislature to invade so long as it can resist that with the aid of the canons of interpretation. That is, however, no more effective than running with the train on the platform, after it has taken speed. For, an English Court is bound to enforce an atrocious law as soon as it is evident that the Legislature has *deliberately* outraged the cherished beliefs of the Nation.<sup>39</sup>

An Indian Court also starts with the presumption of innocence against the Legislature and would avoid such interpretation as would bring the law into conflict with the fundamental law; but would not hesitate to strike it down as soon as the deliberate intent of the Legislature to violate any of the mandates of the Constitution is manifest.

(a) Take for instance, the common law repugnance against *ex post facto* legislation, i.e., the making of a law which penalises, with retrospective effect, an act which was quite legal at the time of its commission, or enhances the penalty by legislation subsequent to the commission of the offence. *Blackstone*<sup>40</sup> denounced this method of legislation as 'unreasonable' and even to-day, an English Court would so interpret a penal law as not to give it retrospective effect.<sup>41</sup> But English courts would be helpless if such effect is given by Parliament expressly.<sup>42</sup> Thus, the Court held<sup>43</sup> that the provision increasing penalties for contravention of the Defence (Finance) Regulations, 1939 was applicable to all convictions after the amendment came into force, even though the offence was committed before the amendment.

That notwithstanding the condemnation of *ex post facto* or retroactive criminal legislation as unreasonable or unfair,<sup>40</sup> Legislatures have not given up this unholy practice in the English-speaking world would be evident from a recent example offered by our neighbouring country, Ceylon,

where, in order to punish the members of an unsuccessful military coup, the Government obtained from the Legislature a special enactment,—the Criminal Law (Special Provisions) Act, 1962, which, *inter alia*, inserted into the existing general law, both substantive and procedural provisions, such as arrest without warrant, creating a new offence, enhancing the existing penalty, and altering the law of evidence, with retrospective effect. Since there was no guarantee against *ex post facto* legislation in the Ceylon Constitution Act [i.e., the Ceylon (Constitution) Order in Council, 1946], corresponding to Art. 20 (1) of our Constitution, it would have been difficult for the Privy Council, before which the Act was challenged on appeal, to strike it down on that ground. Fortunately, the Judicial Committee found its way to strike down the Act on another ground. The Charter of Justice, 1833, according to the Judicial Committee, established the principle of separation of the Judiciary from the executive and the legislature in Ceylon, and this was maintained by the division of powers made by the Constitution Order of 1946. The Judicial Committee held that the impugned Act, by its other provisions, which I shall discuss in another context, had offended against this constitutional principle of separation of powers, by seeking to interfere with the judicial discretion of the courts.<sup>45</sup>

In India, since a prohibition against *ex post facto* legislation has been enshrined in cl. (1) of Art. 20 of the Constitution, any law which violates that prohibition would be struck down and the sentence, awarded under such law, would be quashed by a superior Court.<sup>46</sup>

(b) Similar is the right of an individual to have access to the courts for the determination of his legal disputes with others. The House of Lords<sup>47</sup> has said that it is a fundamental rule of construction of statutes that this right of the individual cannot be excluded except by clear words. If, however, clear words of exclusion are used by Parliament, an English court has to give way.<sup>48</sup>

But our Courts are not so helpless even though there is no express provision in the Constitution guaranteeing this right. It has been deduced from the right to 'equality before the law' which is guaranteed by Article 14 of our Constitution, and the decisions of the Supreme Court on this point<sup>49</sup> are standing monuments to the interest and ability of our Judges in wielding this power of judicial review to uphold the rights of the individual, in the maintenance of which English Judges are no less anxious: but they lack the necessary power against the law-giver.



(i) The most common device adopted by Legislatures to exclude the jurisdiction of the courts over certain acts or decisions of the administration is to say that "no court shall have any jurisdiction" to entertain any dispute relating to such matters or question. An English Court would be powerless in the face of such express provision excluding jurisdiction,<sup>45</sup> unless Parliament itself intervenes to save a remedy, notwithstanding such exclusionary clause, e.g., the Tribunals and Inquiries Act, 1958, which saves the remedy of *certiorari* against such a clause.

Clauses excluding jurisdiction of Courts.

On the other hand, our Supreme Court has had no difficulty in coming to the conclusion that even such blanket provision cannot exclude the jurisdiction of the superior Courts, i.e., of the Supreme Court under Art. 32<sup>46</sup> or Art. 136<sup>47</sup> or of a High Court under Art. 226<sup>48</sup> or 227<sup>49</sup> of the Constitution, for, any interpretation to the effect that the expression 'no court' includes the Supreme Court or High Court would only lead to the annulment of the statutory provision, for, the remedies provided by the Constitution in respect of these superior Courts cannot be taken away by any legislation short of an amendment of the Constitution.

If an administrative decision affecting a fundamental right is made 'final' or 'conclusive' by the Legislature, so as to preclude it from challenge in a court of law, such legislation would also be liable to be struck down as constituting an unreasonable restriction upon the fundamental right.<sup>50</sup>

(ii) Even the exclusion of the inferior courts will be struck down (in India) as offending against the guarantee of equal protection of the laws under Art. 14 where it is evident that a statute leaves it to the discretion of the Executive to place the same case or class of cases either before the ordinary court or before a special tribunal which is governed by a law more stringent to the accused person, and there is no reasonable basis for such classification.<sup>51</sup>

Providing for special tribunal.

(iii) More dexterous and pernicious is the attempt of the Legislature to assume the powers of the courts of the land to itself and to decide a private dispute between particular individuals by a legislative decree.

This legislative process of punishing named individuals by legislation, instead of by a trial in court, is, as I have shown in another context, the modern relic of a bill of attainder or a bill of pains or penalties, which has been condemned in England by jurists such as *Blackstone*, when he said<sup>52</sup>—

Adjudication by legislative decree.

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"Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law".

But the power of Parliament to pass such law has never been formally abolished in England, and even in a 1967 Text-book it is described as 'possible but in practice obsolete'.<sup>54a</sup>

Since there is an express provision in the American Constitution against such legislation [Art. 9(3)], it has been easier for the American Supreme Court to annul statutes which may come within the mischief of the prohibition, either expressly or by a liberal interpretation,<sup>55</sup> arriving at newer results even in 1965.

Where there is no such express prohibition, Courts nevertheless condemn such legislation and may strike it down applying some other constitutional principle, as did the Privy Council in invalidating the Criminal Law (Special Provisions) Act, 1962 of Ceylon, on the ground that it offended against the principle of separation of judicial powers, which was implied in the Ceylon Constitution Order of 1946.<sup>56</sup>

In India, prior to the advent of our Constitution, such legislation, namely, to punish named persons without trial or to determine the claims of rival persons to succeed to an estate of magnitude, was not uncommon but no question as to the constitutionality of such legislation could possibly be raised before any court of law.<sup>57</sup>

But since the coming into operation of the Constitution such legislation has been challenged in several cases and our Supreme Court has held that it must be annulled since it deprives particular individuals of the right of access to the courts of law to have their legal rights adjudicated, which all others possess. Such has raised against particular named individuals, it has been held, offends against the guarantee of equality offered by Art. 14.<sup>57, 58</sup>

IV. On the other hand, some of the universal principles of fairness, which are included in the private law of England, have been enshrined in our Constitution in the Chapter on Fundamental rights. The question 'why'

may instantly arise and the answer is that the object of the makers of our Constitution was to bind the Legislature so that it might not ride roughshod over those indispensable safeguards against miscarriage of justice in the same way as it had taken place in colonial America and imperial India.

It should never be forgotten that when the American colonists struggled against the rigours of arbitrary measures passed

Codification of common law principles in the Indian Constitution.

by the British Parliament, they relied upon the very principles of English common law to assert that those measures were contrary to "the undoubted right of Englishmen", for instance, "that no taxes be imposed on them but with their own consent, given personally or by their representatives...."<sup>58</sup> When, therefore, the colonists attained independence, they embodied in their Constitution as many of the common law rights as they considered essential for preventing a future Legislature of the United States from being as capricious as the British Parliament.

India, too, has embodied in her Constitution many of the common law ingredients of English liberty, with the same object in view.

One of these is a corollary from the presumption of innocence of the accused which has been described by Viscount Sankey as "the golden thread" "running through the web of English law",<sup>59</sup> and which came into being at the dawn of Anglo-Saxon Jurisprudence, after the days of trial by ordeal<sup>60</sup> and the Star Chamber were over. The corollary which was later incorporated in a statute,—the Criminal Evidence Act, 1898,—is that though the accused is competent to be a witness on his behalf, he cannot be compelled to give evidence against himself. Codification of the common law rule, no doubt, serves as a better check upon an erring Judge, if there be any, liable to play into the hands of the prosecution, as an 'instrument of persecution', as American Judges might say.

What happens if the Parliament of England itself cuts through the 'golden thread' by doing away, in whole or in part, with this provision of the Criminal Evidence Act? Do you really believe that there would be a revolution if the august body at Westminster is persuaded by social or political circumstances to curtail this immunity of the accused?<sup>61</sup> If so, why has there been not even a flutter when the presumption of innocence itself has been replaced by a presumption of guilt in respect of many statutory offences? People of England hardly bother, having left the matter to the courts.<sup>62</sup>

S. 259 of the Customs Consolidation Act, 1876,<sup>63</sup> for instance, says—

"If in any prosecution in respect of any goods seized for non-payment of duties....., any dispute arises whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported..... then and in every such case the proof thereof shall be on the defendant in such prosecution....."

The Court upheld a conviction made on the ground that the accused had failed to discharge the onus of proof laid upon him by the Legislature in the foregoing provision.<sup>64</sup>

In the *U. S. A.*, it has been held in a numerous cases that when the Legislature enacts such statutory presumption of guilt, the validity of such presumption may be tested by the Courts on the standard of 'due process' and that the Court would strike down such statutory presumption where there is no *rational connection* between the fact proved and the fact presumed which might justify the shifting of the burden of proof upon the person affected.<sup>52</sup>

In *India*, similarly, if such a provision is made by the Legislature, the constitutionality of such provision would be open to challenge. In fact, s. 178A, inserted in 1955 in the Sea Customs Act, 1878, which lays a similar burden of proof on the accused, was subjected to such challenge. The section provides—

"Where any goods to which this section applies are seized under this Act in the reasonable belief that they are *smuggled goods*, the burden of proving that they are *not smuggled goods* shall be on the person from whose possession the goods were seized."

The Supreme Court could uphold the validity of this provision as a 'reasonable' restriction upon the freedom of property and business guaranteed by sub-cl. (f)-(g) of Art. 19 (1) only on the finding that such a drastic measure was called for to put a stop to the deleterious social and economic effects of wide-spread smuggling of commodities like gold, which was prevalent at the time of the legislation.<sup>53</sup>

The question before us is whether it is advisable to incorporate the guarantee against self-incrimination,—not in a statute but in a higher law,—so that a Judge like Viscount Sankey might be empowered to act as an umpire to restore this golden thread if Parliament, unfortunately, animated by its omnipotence, forces its way through it. American Judges have so often warned us that such encroachments of the Legislature may be 'stealthy'<sup>54</sup> and 'gradual';<sup>55</sup> may be 'covert' instead of being 'overt'.<sup>56</sup>

Before you come to your answer on the question, I would like to take you to s. 94 of the Criminal Procedure Code,—1898,—yet another statute enacted by a legislative body set up by the British Parliament, in *India*.

S. 94, in short, empowers a Court or a Police authority to issue compulsory process for the production of any document considered necessary for the purposes of "any investigation, inquiry or trial" against "the person in whose possession or power the document is believed to be". Not only is there a provision for search in case the person so called upon fails to produce such document, there is also a provision for punishing him for such failure (s. 485, *ibid.*). There is no doubt that

Constitutional guarantee against self-incrimination.

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such person would be compelled by these provisions to give evidence against himself by the production of the document, if the provision in s. 94 extends to a person accused of an offence. Books on Grammar and the Science of Logic would tell us that the article 'the' before the word 'person' would exhaust the universe of discourse and would include every person in whose possession the document necessary for the investigation or trial may be, whether or not he stands charged with any offence. So, it was held by some of our High Courts<sup>47</sup> that s. 94 was applicable also to an accused person and that, accordingly, it became unconstitutional upon the inauguration of the Constitution inasmuch as Art. 20 (3) guarantees that—

"No person accused of an offence shall be compelled to be a witness against himself."

But our Supreme Court has held<sup>48</sup> that in view of the prohibition in Art. 20 (3) of the Constitution, the provision in s. 94 of the Criminal Procedure Code should be so interpreted as *not to extend to the accused*. Though the statutory provision has thus been saved from the odium of being invalidated directly, the result is the same from the standpoint of constitutional jurisprudence,—whatever be the process adopted,—namely, that notwithstanding a statutory provision which has been on the statute-book for over half a century, an accused can no longer be compelled to produce the documents in his possession because the Constitution of the land protects him against such Star Chamber method of proving the guilt of an accused himself.<sup>49</sup>

The foregoing discussion demonstrates that the installation of a representative democracy or Parliamentary government is not a complete solution of the problem of Power which, as I have said at the outset, is a perennial problem which man has had to struggle with since the dawn of political society. When absolute power is transferred from the Monarch to the Legislature, limitations have to be invented upon the power of the latter. Thus, "the history of liberty", as *Woodrow Wilson* once said, "is the history of limitations upon the powers of government". Whenever man has failed to impose effective limitations upon the repository of absolute power, he has been in chains.

~~XX~~ The contribution of the Americans to this history of limitations upon political power is the introduction of the concept of 'limited government', which we, in India, have borrowed from them. It is loosely described as "a government of laws and not of men",—an expression which was formally adopted in the Constitution of Massachusetts of the year 1780<sup>50</sup>. It means a governmental system in which absolute power is not

<sup>47</sup> Significance of 'limited government'.

vested in the hands of any of the organs of the State, that is to say, in any particular group of men, whatever might be their composition. It necessarily means that the authority of each of the organs of the State shall be limited by a higher law, in the form of a written Constitution<sup>21</sup> and, what is no less important, a sanction and an agency to enforce the limitations imposed by that fundamental law.<sup>22</sup> In America, as in India, it is that law which is the 'King'.<sup>23</sup>

This is not to suggest that limited government is the last word in political development, but that it is a *later growth* than Parliamentary government and has been invented to check the evils of majority rule which is involved in the Parliamentary system, just as the sovereignty of Parliament itself was introduced to abolish the tyranny of an absolute monarch. A critic might, for the matter of that, contend that limited government means a rule of the minority. But that is not correct because limited government does not confer any political power into the hands of the minority but confers power in the hands of an arbiter, namely, the Judiciary, to see that unlimited power may not be wielded by the majority, regardless of the interests of the minority. It is not a government by the minority but a government by the majority which safeguards the rights and interests of the minority, by enshrining certain limitations in an inviolable law. It is founded on a belief that a majority of the people or their representatives may be as tyrannical as a single monarch, or a dictator, and that unless its powers are defined and limited by a higher law, it would be the exercise of "power without right",<sup>24</sup> as Thomas Paine observed some two hundred years ago.

Nor is limited government an antithesis of democracy. In the history of political institutions, it is an improvement upon representative democracy. Just as direct democracy of the ancient City State was replaced by oligarchy and later by representative democracy, so are the possible evils of representative democracy,—which can only work by the vote of the majority,—sought to be reduced by imposing constitutional limitations upon the omnipotence of a representative assembly. Representative democracy ensures that the powers of the government are *derived* from the consent of the governed. But that is not enough; once returned to power by election, a representative assembly cannot be bridled by anything short of revolution if it is intoxicated by unlimited power. Hence, arises the theory that by such consent, government can derive only just powers,—for no one can be supposed to give his consent to the conferment of such power as may be unjust to himself,—a theory which was propounded by John Locke in 1690, and which was transcribed

into the American Declaration of Independence by Jefferson, in the year 1775. It is to ensure this object, that is, to ensure that the people's representatives may not exercise 'unjust' powers, that constitutional limitations are imposed in countries which believe in limited government.

It has sometimes been argued that a people of one generation have no right to bind down posterity to their views. But even under the Parliamentary system, the representatives may not always faithfully represent the current views of the electors and the disparity may be corrected only at the next election. A written Constitution does not seek to bind the people to the views of the makers of the Constitution for good unless it is completely unamendable. It merely seeks to protect the people from 'violent acts' "which might grow out of the feelings of the moment..... from the effects of those sudden and strong passions to which men are exposed." A written Constitution embodies the permanent convictions of the entire community, as opposed to the temporary wishes of the majority of the people's representatives for the time being, and, if at any time, the considered views of the community change, the Constitution would certainly be amended. Then, again, a Constitution does not and cannot embrace matters of everyday life, such as marriage, divorce or other social relations or practices, which are left to ordinary legislation. It only enshrines certain minimal conditions of free existence, to protect them from inroads of the party in power, particularly in times of war or other emergency which may call for extraordinary powers for the administration, and when the threat to the individual from legislation which legalises illegalities committed by the Executive may be the greatest.<sup>74</sup>

In this context, I cannot help reproducing the arguments in favour of limited government which the French observer *de Tocqueville* advanced in his *Democracy in America*:<sup>75</sup>

"A majority taken collectively may be regarded as a being whose opinions, and most frequently whose interests, are opposed to those of another being, which is styled minority. If it be admitted that a man, possessing absolute power, may use that power by wronging his adversaries, why should a majority not be liable to the same reproach? Men are not apt to change their characters by agglomeration..... And for these reasons I can never willingly invest any number of my fellow-creatures with that unlimited authority which I should refuse to any one of them....."

When I see that the right and the means of absolute command are conferred on a people or upon a king, upon an aristocracy or a democracy, a monarchy or a republic, I recognise the germ of tyranny.....

Under the absolute sway of an individual despot, the body was attacked in order to subdue the soul; and the soul escaped the blow; but such is not the course adopted by tyranny in democratic republics; there the body is left free, and the soul is enslaved.<sup>76</sup>

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It would not be far from the truth to add that it is in the interests of the majority that minority rights should be safeguarded because no democracy can long survive if it does not offer certain basic rights to the minority. While in a democracy having no written Constitution, as in the United Kingdom, the majority has to respect minority rights by the practice of self-restraint in countries adopting a written Constitution the limitations are embodied in a written Constitution; and the history of constitutionalism gives its verdict in favour of the latter alternative.<sup>70</sup>

India has adopted a written Constitution with a full deliberation and understanding of its preceding implications. It would be doing injustice to the Constitution and a perversion of constitutionalism if for a moment it is forgotten that a written Constitution with judicial review means limited government,—an antithesis of Parliamentary sovereignty,—in so far as limitations thereupon have been introduced by the Constitution. It is lamentable that even the makers of our Constitution have sometimes forgotten this basic truth underlying the Constitution. Pandit Nehru, the architect of the Constitution, himself, committed such blunder, in his zeal for abolition of the Zemindary system, to effect agrarian reform, when he said<sup>71</sup>—

"No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis where the future of the community is concerned, no Judiciary can come in the way..... Ultimately..... the Legislature must be supreme and must not be interfered with by the Courts of law in such measures as social reform"<sup>72</sup>

The foregoing words are laudable in so far as they are inspired by the object of distributing the land resources of the country amongst the toiling masses; but as a legal statement, almost every part of it is fallacious:

Firstly, the Parliament of India, as a legislature, is not sovereign but is limited by the Constitution almost at every step. However one might differ from the conclusions of the majority in *Golak Nath's case*,<sup>73</sup> there is one proposition which is unexceptionable:

In India, the Constitution, not Parliament, is sovereign.

"No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land."<sup>74</sup>

It is interesting to note that while making the aforesaid utterance, Pandit Nehru perhaps forgot that the move for having a written Constitution with a Bill of Rights was initiated by a pre-Independence Committee which went by his own name,—the Nehru Committee, which submitted its report in the year 1928. It was proposed that a written Constitution with a declaration



of inviolable rights should be adopted, following the precedent of the Irish Free State, which also had suffered from the aggression of the British Parliamentary government. So said the Report:—

Ireland is the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India. The first concern of the people of Ireland was, as indeed it is of the people of India to-day, to secure fundamental rights that have been denied to them. . . . Ireland was taken and kept under the rule of England against her own will and the acquisition of dominion states by her became a matter of treaty between the two nations. . . . That India is a dependency of Great Britain cannot be denied. That position can only be altered in one of two ways—force or mutual consent. It is the latter in furtherance of which we are called upon to recommend the principles of a constitution for India. In doing so it is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

It is because the powers of the Legislature were liable to be curbed if a Constitution with limitations in the form of declaration of fundamental rights was adopted that the Simon Commission,<sup>79</sup> composed of people inspired with the model of British Parliamentary sovereignty, rejected that proposal and prescribed instead discretionary powers being vested in the heads of the Executive to protect the interests of minorities:

" . . . we feel that there is indeed need for safeguards. But we consider that the only practical means of protection of the weaker or less numerous elements in the population is by the retention of an impartial power, residing in the Governor-General and the Governors of provinces, to be exercised for this purpose."

The reason why the Britishers rejected the idea of incorporating fundamental rights was more explicit in the Report of the Round Table Conference (Third Session, 1932) and the Joint Parliamentary Committee's Report (1934). In the first Report, it was stated:

"In the agenda of the Conference the question of Fundamental Rights was purposely linked up with the question of the powers of the Legislature, because it was felt that it had been insufficiently realised that the effect of inserting provisions of this kind in the Constitution must inevitably be . . . to place statutory limitations on the powers of the new Legislatures which may well be found to be of the highest practical inconvenience."

That practical inconvenience was explained by the Joint Parliamentary Committee in these words:

" . . . its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of inconsistency with one or other of the rights so declared."

This argument of inconvenience resulting from legislative measures being annulled by the courts had however been answered by Jefferson<sup>80</sup> long ago—

→ "The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and reparable."

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The inconveniences of the want of a declaration are permanent, afflictive and irreparable. They are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread....."

When, after Independence, our leaders came to frame the Constitution for the Republic of India, they must have considered 'the practical inconveniences' of having a written Constitution with Judicial Review and preferred the views of Jefferson to the exclusion of those of the Britishers. After that Constitution has been launched and Judicial Review has been at work, it is too late to be intolerant of the interference by the courts with legislative enactments, or to proclaim the sovereignty of Parliament.

Paradoxically, it may be pointed out, that even the Judicial Committee of the Privy Council, in applying written Constitutions of the Commonwealth countries, has laid down that where a Legislature has been created, with limitations on its powers, by a written Constitution, it would be a blunder to talk of the omnipotence of the Legislature or its competence to override principles like the separation or independence of the Judiciary. Thus, the Judicial Committee had no hesitation to strike down an Act made by the Ceylon Parliament which sought to interfere with the judicial function by laying down compulsory punishment of certain political prisoners. The Judicial Committee held that the Act violated the principle of separation of judicial powers from the Executive and the Legislature which was implied in the Ceylon Constitution Order in Council of 1946, even though there was no express provision vesting the judicial power exclusively in the Judiciary.<sup>61</sup> Repelling an argument that the Courts would be powerless to annul such an Act, if passed in England, the Judicial Committee, speaking through Lord Pearce observed—

"During the argument analogies were naturally sought to be drawn from the British constitution; but any analogy.....provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power."<sup>62</sup>

It would be worth while for all of us to remember the basic fact that a written Constitution with Judicial Review is adopted by a country because it refuses to believe in "the Divine Right of Parliaments", which Herbert Spencer denounced as "the great political superstition of the present".<sup>63</sup>

Secondly, as an eminent Chief Justice of our Supreme Court has pointed out,<sup>64</sup> our Constitution—the supreme law of the land—has by express provisions [e.g., Art. 13], instead of leaving it to inference, placed the power of Judicial Review in the hands of the Judiciary. If, therefore, the Court, on a proper interpretation of the Constitution, finds a legislative enactment to be inconsistent with the Constitution, it is its duty, as a defender

of the Constitution, to invalidate the statute. In the words of Sastri C.J.—

"If, then the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution".<sup>82</sup>

To belittle the Courts is thus to belittle the Constitution itself, for, a Constitution which embodies the principles of limited government rests on the Courts and their power of Judicial Review by means of which only the Constitution, as an instrument of limited government, can be maintained. Of course, in this context, the need for judicial restraint to avoid going out of its depth should also be remembered and of this I shall speak hereafter.

Thirdly, if the Parliament of India has any power to override judicial decisions, by amending the Constitution itself, in exercising that power, Parliament must be assumed to be acting in conformity with the considered views of the nation, and not "in a crusader's spirit" to undermine judicial authority, just as a Court does not defeat a measure of social reform "in a crusader's spirit"<sup>83</sup> against legislative authority.

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5. Cooley, *Constitutional Law*, 1931, pp. 45, 7; Dowling, *Constitutional Law*, 1939, pp. 50-1.
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- ✓ 11. Dicey, *Law of the Constitution*, 10th Ed., p. 81.
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13. *Bonham's case*, (1610) 8 Co. 144a; *Day v. Savage*, (1614) Hob. 87.
14. *Ameeroomista v. Mahboob*, (1953) S.C.R. 404.
15. *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.
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18. *Vide Fedco v. Bilgrami*, A.I.R. 1960 S.C. 415; *Shivji Nathubhai v. Union of India*, A.I.R. 1960 S.C. 606.
19. *Rashbehari v. State of Orissa*, A.I.R. 1969 S.C. 1081 (1087).
20. Coke C. J. in *Bonham's case*, (1610) 8 Co. Rep. 114 (118).

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21. If it is to be a government 'for' the people it must be something more than a mere government 'by' the people, not that a fourth man must have his nose cut simply because three of his neighbours have said it must be cut.
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23. *Day v. Saradge*, (1615) 110b. 85 (97).
24. *Cl. R. v. Barnsley Licensing JJ.*, (1960) 2 All E.R. 703 (C.A.); *Watkinson v. Barking Corp.*, (1948) 1 All E.R. 564 (C.A.).
25. *Dimes v. Grand Junction Canal Co.*, (1852) 3 H.L.C. 759.
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29. *Schneider v. Irvington*, (1839) 308 U.S. 147 (160).
30. *Palko v. Connecticut*, (1937) 302 U.S. 319.
31. Dicey, *Law of the Constitution*, 10th Ed., pp. 240 et seq.
32. *Vide R. v. Burns*, (1896) 16 Cox C.C. 355, adopting Stephen's Digest of the Criminal Law, 8th Ed., Art. 114.
33. *Sadashiv v. Emp.*, (1947) 74 I.A. 89; *Emp. v. Shibnath*, A.I.R. 1945 P.C. 156.
34. *R. v. Aldred*, (1909) 22 Cox C.C. 1.
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37. *Near v. Minnesota*, (1931) 283 U.S. 297; *De Jonge v. Oregon*, (1937) 299 U.S. 353.
- 37a. *New York Times v. Sullivan*, (1964) 376 U.S. 254 (273-6); see also *Rosenblatt v. Baer*, (1966) 383 U.S. 75 (87).
38. *Vide Nihalendu v. Emp.*, (1912) F.C.R. 38.
- 38a. *Kedar Nath v. State of Bihar*, A.I.R. 1962 S.C. 955.
- 38b. Cf. Dicey, *Law of the Constitution*, 10th Ed., p. 249.
- 38c. Basu, *Commentary on the Constitution of India*, 5th Ed., Vol. I, p. 660.
- 38d. *Terminiello v. Chicago*, (1949) 337 U.S. 1.
- 38e. *E.g., Near v. Minnesota*, (1931) 283 U.S. 687; *Grasjan v. American Press Co.*, (1936) 297 U.S. 233; *Mills v. Alabama*, (1966) 384 U.S. 214.
- 38f. *Express Newspapers v. Union of India*, A.I.R. 1958 S.C. 578 (611); *Sakal Papers v. Union of India*, A.I.R. 1952 S.C. 305.
39. *Central Control B.I. v. Cannon Brewery Co.*, (1919) A.C. 744 (752); *A. G. for Canada v. Hallett*, (1952) A.C. 427 (450); *Chester v. Bateson*, (1920) 1 K.B. 829; *Buckman v. Button*, (1913) 2 All E.R. 82.
40. Blackstone, *Commentaries*, Vol. I, p. 46; vide also Allen, *Law in the Making* (1964), pp. 465-7.
41. *Hutchers, Hide Co. v. Seacombe*, (1913) 2 K.B. 401; *Moon v. Darden*, (1818) 2 Ex. 22; *Young v. Adams*, (1898) A.C. 469 (476).
42. *Director of Public Prosecution v. Lamb*, (1941) 2 K.B. 89.
43. *Vide Liyanage v. R.*, (1966) 1 All E.R. 650 (658-660) P.C.
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53. *State of W. Bengal v. Anwar Ali*, (1952) S.C.R. 284 (330); *Dhirendra v. Legal Remembrancer*, (1955) 1 S.C.R. 224.
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55. *U. S. v. Lovett*, (1946) 328 U.S. 303; *U. S. v. Brown*, (1966) 381 U.S. 437.
56. *Liyanage v. R.*, (1966) 1 All E.R. 650 (659-660) P.C. [See p. 56, ante].
57. Cf. *Amersonissa v. Mahboob*, (1953) S.C.R. 404.
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59. *Vide The Convention of New York*, October, 1765.
60. *Woolmington's case*, (1935) A.C. 462 (481-2).
61. Taswell-Langmead, *Constitutional History* (1960), pp. 23, 73; Maitland, *Constitutional History of England*, (1965) pp. 119, 221, 311, 477.
62. In fact, the provision in s. 4 (1) of the Criminal Evidence Act, 1898 that the

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spouse of a person charged with an offence under any of the statutes mentioned in the Schedule of that Act may be called as a witness either for the prosecution or for the defence was sought to be utilised by the prosecution to compel a spouse to be a witness against her husband. This attempt had to be thwarted by holding that the presumption against self-incrimination which was extended by common law to a spouse, was not expressly taken away by the Act.

"The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied on in this case." [Leach v. R., (1912) A.C. 305 (311)].

It follows that if there was an express provision to the effect that the spouse could be compelled to be a witness, the Court would have been helpless.

63. *R. v. Fitzpatrick*, (1948) 1 All E.R. 769 (772). As instances of similar statutes making a statutory presumption of guilt, in England, see s. 2 of the Sunday Observance Act, 1780; s. 2 of the Gaming Act, 1845; s. 9 of the Public Stores Act, 1875; s. 9 Forgery Act, 1913; s. 23(2), Larceny Act, 1916; s. 9, Coinage Offences Act, 1936; s. 4, Prevention of Corruption Act, 1916; s. 3, Foods and Drugs Act, 1935; s. 1(1), Drugs (Prevention of Misuse) Act, 1964; and the cases cited in *R. v. Evans*, (1966) 2 All E.R. 470 (C.C.A.), which constitute exceptions to the proposition laid down in *Waddington's case*, (1935) A.C. 462. The House of Lords is still struggling with the problem (vide cases such as *Warner v. Metropolitan Police Commr.*, (1958) 2 All E.R. 356 and *Street v. Parole*, (1969) 1 All E.R. 347).
- 63a. *Vide Tot v. U. S.*, (1943) 319 U.S. 463, and other cases discussed at pp. 596-600 of Vol. I of the Fifth Edition of Basu's Commentary on the Constitution of India; *Levy v. U. S.*, (1959) 255 U.S. 6.
- 63b. *Collector of Customs v. Sampathu*, A.I.R. 1962 S.C. 316 (333-4). The observations in this judgment as well as in subsequent cases lead to the conclusion that in the absence of a social evil of such magnitude, the Court would not uphold the reasonableness of a statute which throws the burden of proof upon the accused [vide *State of Bombay v. Narandas*, A.I.R. 1962 S.C. 579 (583); *Gian Chand v. State of Punjab*, A.I.R. 1962 S.C. 496; *Krishna v. State of Madras*, A.I.R. 1957 S.C. 297 (301); *Abdul Hakim v. State of Bihar*, A.I.R. 1961 S.C. 443 (458)].
64. *Boyd v. U. S.*, (1886) 116 U.S. 613.
65. *Pennsylvania Coal Co. v. Mahon*, (1922) 250 U.S. 322.
66. *Cl. Smith v. Allwright*, (1944) 321 U.S. 649.
67. *Cl. Satyokinkar v. Nikhil*, A.I.R. 1951 Cal. 101.
68. *State of Gujarat v. Mohanlal*, A.I.R. 1965 S.C. 1251; (1965) 2 S.C.R. 457.
69. *Cl. Mailland*, Constitutional History of England, 1965, p. 231.
- ✓70. Art. XXX of the Constitution of Massachusetts, 1780, and reiterated by Marshall, C.J. in *Marbury v. Madison*, *ibid.*
- ✓71. *Marbury v. Madison*, (1803) 1 Cr. 137 (163).
- ✓72. Thomas Paine, Political Writings (1837), pp. 45-46.
- ✓73. Thomas Paine, Rights of Man, 1792, p. 182 (Everyman).
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77. IX C.A.D., 1195-6.
78. *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (1655).
79. Simon Report (1930), Vol. I.
- ✓80. Dumbauld, Political Writings of Jefferson, pp. 127-8.
- ✓81. Herbert Spencer, Man versus the State.
82. *State of Madras v. V. G. Row*, (1952) S.C.R. 597 (605), Sastri, C.J. ✓

## LECTURE III

## THE WRITTEN CONSTITUTION AS A LIMITATION.

Since the death of absolute monarchy in England, absolutism has ceased to have any advocates in the civilised world and the need for putting limitations upon *any* body of men in power for the time being has been established beyond doubt by the force of events themselves.

But while in England, 'constitutional government' has come to mean the limitation of executive power by law made by the representatives of the people and, broadly speaking, except during a short interlude in the days of the Cromwellian 'Commonwealth', in the mid-seventeenth century (to which I shall advert more fully hereafter), no attempt has so far been made in England to impose limitations upon the sovereign power of Parliament itself by any formal instrument,—in the United States and in countries which have followed its steps in having a written Constitution, such as India, 'limited government' has come to mean that unlimited power should not be reposed in any body of men,<sup>1</sup> not even a representative body. As Justice Miller of the American Supreme Court said,<sup>2</sup> in the absence of any such limitations, "even the most democratic depository of power" becomes

"a despotism of the majority, if you choose to call it so, but it is none the less despotism".

In the twentieth century, the bulk of the civilised world has embraced the faith that absolute power is not desirable, whatever good it may promise to deliver. But while England has sought to control Power by making it responsible to the representatives of the people, in the United States or in India, it is realised that that is not enough inasmuch as a representative assembly may at times behave capriciously and therefore require to be controlled.<sup>3</sup> Freedom of the individual is not secure unless institutional means to curb authority, wherever placed,—are devised.

A written Constitution necessary for 'limited government'.

The institution of government was intended to serve and not to dominate the people. It must, of course, be endowed with all powers necessary for this purpose, but if anything is to be supreme, it should not be the representative assembly, but a Constitution which embodies the will of the people, as the 'fundamental law' of the land. Limited government thus involves the supremacy of the Constitution in place of the sovereignty of Parliament.

The concept can hardly be better described than in the words of Hamilton in the *Federalist*<sup>1</sup>—

"By a limited government, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution, to be void. Without this, all the reservations of particular rights or privileges would amount to nothing."

It is in this sense that the expressions 'limited government' and 'judicial review' have been used in these Lectures, as explained at the very outset.

The very fact that there is a written Constitution defining the powers of the different organs of government means that the powers of each of them are limited by the terms of that Constitution and none can exercise any arbitrary power beyond what is granted by that instrument.<sup>2</sup> The superiority of the written Constitution as a fundamental law is due not merely to the nature of the principles embodied in it but because the Constitution is the expression of the popular will (as expressly declared in the Constitutions of the U.S.A. and India). The words of Marshall C.J. in *Marbury v. Madison*,<sup>3</sup> on this point, are still instructive:

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . .

The original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; that these limits may not be mistaken or forgotten, the constitution is written."

A Legislature, which is otherwise omnipotent, becomes limited as soon as a written Constitution is adopted. The reason was thus explained in an early American case:<sup>4</sup>

"The Constitution. . . . contain(s) the permanent will of the people, and is the supreme law of the land; it is paramount to the Legislature. . . . What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. . . . The Constitution is the work or will of the People themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. . . . The Constitution fixes limits to the exercise of legislative authority. . . . every act of the Legislature, repugnant to the Constitution, is absolutely void. . . ."

Primarily, thus, in order to place limitations upon the powers of the Legislature that the device of having a written Constitution as a paramount law was discovered<sup>5</sup> and anybody who wants to understand the Indian Constitution must appre-

ciate this theory of a paramount or fundamental law, standing over all the organs of the State and their acts, including the laws made by the Legislature (which are called 'ordinary' laws as distinguished from the organic or 'fundamental' law as embodied in the written Constitution).

This concept of a superior law has its roots in the earliest chapters of political philosophy. Hence, though Political Philosophy is obviously beyond the scope of these Lectures, a brief account of the origin and development of this concept is indispensably necessary for those who want to understand and interpret the Constitution of our land properly, particularly, because it has indeed been forgotten by men of importance, from time to time.<sup>9</sup>

The concept of a 'fundamental law' is, to anticipate matters, a direct descendant of the concept of 'Natural law' which, of course, has various facets with all of which we are not concerned in the present context. From early times, thinkers have conceived of certain universal principles of human conduct as constituting the law of nature or natural law, as distinguished from 'positive law', that is, the law of a State as promulgated by its legal sovereign, and thus founded on the will of a particular person or persons.

Whatever may have been the logical fallacies underlying this much-debated doctrine of 'Natural law', it has, throughout the history of civilisation till to-day, served as an appeal to something higher than the positive law prescribed by a human sovereign for the time being, and it is that ideal which has led to the evolution of a written Constitution, whenever men have been disillusioned of the existing order.

The law of nature is neither promulgated by any formal act of the sovereign nor is it sanctioned by its command, but it comprehends universal principles which are prescribed to all men by Nature (or by God Himself,—the Sovereign of the Universe<sup>10</sup>).—speaking through the conscience of each individual or through the dictates of human reason. The contents of Natural Law, thus, are not as definite or as certain as the law promulgated by a human sovereign, but they are rules deduced by the common experience of mankind and are founded on their collective reasoning, that is to say, upon the primary instincts of men as modified by their inborn perception of the right and the wrong, of the just and the unjust.

Since natural law is the embodiment of pure reason and is supposed to be derived from Nature or God, it follows that natural law is superior to all man-made laws. It is this concept of

Genesis of the concept of a superior law.

Natural law as distinguished from positive law.

Natural law superior to positive law.



a supreme or higher law standing above all laws enacted by a human sovereign—whether a monarch or a representative Legislature—which constitutes the foundation of the superiority of the Constitution to laws made by the Legislature which itself is created by that fundamental law.

In the Western hemisphere, the story of an immutable higher law began with the poetic effusion of Sophocles<sup>11</sup> when he told a tyrant, through the mouth of Antigone, that no mortal, however powerful he might be, could override—

"The unwritten and unswerving laws of Heaven,  
Not of today and yesterday are they,  
But from everlasting....."

This crusade of man against absolutism since the beginning of civilisation is, in fact, the essence of the doctrine of constitutionalism or limited government even to-day.

To Aristotle we owe the proposition that what is prescribed by Nature is ideal and universal, while man-made law is not. In his *Nicomachean Ethics*,<sup>12</sup> he thus observes—

"Of political justice, part is natural, part legal; natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent. .... That which is by Nature is unchangeable and has everywhere the same force. .... The things which are just not by Nature but by human enactment are not everywhere the same; .... though there is but one which is everywhere by Nature the best."

So far, we have in the law of nature an ideal or norm for human action. But it was yet too early to conceive of a superior law setting forth the limits of governmental authority, which, if transgressed, would render the act of such authority invalid.

A definite formulation of a higher law, superior to and more universally binding than the positive maxims of the different systems of municipal law, was the gift of Stoic political philosophy, which attributed not merely an order of things but superior reason to the law of nature.

Cicero (106-44 B.C.). Cicero,<sup>13</sup> of the Stoic school, thus observed—

"True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions. .... It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed by the Senate nor the people can we be released from this law; nor does it require any but oneself to be its expositor or interpreter. Nor is it one law in Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time. ...."

Here, thus, was the earliest assertion of the law of nature.

as a law superior to positive law<sup>13</sup> as a test for judging the legitimacy of any political authority and as a higher law which could not be violated by any assembly of men.

In the Middle Ages, natural law was further elevated by associating it with the law of God. An appeal to such higher law became necessitated by the chaotic conditions of the times which was taken advantage of by the monarchs. It came to be asserted as a limitation upon all human authority, because though it was a product of human reason, it was derived from eternal law or divine reason.

Middle Ages. St.  
Thomas Aquinas (1225-  
74 A.D.).

The representative spokesman of the Middle Ages was St. Thomas Aquinas, who asserted the following propositions:

(i) Though the King was above positive law, he was not above natural law.

(ii) The validity of positive law was to be tested by the norm of natural law and a rule of positive law which conflicts with natural law does not bind the conscience of the subject.<sup>14</sup> The reason is that natural law is "the participation in the eternal law of the mind of the rational creature"<sup>15</sup> and, accordingly, the positive law of particular States is true or valid<sup>16</sup> only in so far as it partakes of the law of nature and is not in conflict with it.

(iii) The people had a right to depose a tyrant who violated natural law.<sup>17</sup>

But though the dangers of absolute power were realised by mediaeval thinkers, they failed to achieve success because of want of any effective sanction against arbitrary exercise of power. Since the law of nature was identified with or derived from the law of God, naturally, the authority best fitted to enforce its observance was the Church. The protest against absolutism, in the Middle Ages thus, merely led to the supremacy of the Church in place of monarchical absolutism, so much so that it has earned for the Pope of the fifteenth century the epithet of being "the first of the absolute monarchs".<sup>17</sup>

But the cause of a higher law was not lost by reason of this perversion by its episcopal spokesmen.

When Bracton said<sup>18</sup> that though the King was subject to no man, he was "subject to God and to the law", he had in his mind a superior law which was founded on reason and justice, and it was this concept which was later echoed by Lord Coke when he repeated these words in the face of the absolute monarch James I.<sup>19</sup>

Bracton (1250 A.D.).

Coke was similarly inspired by the concept of a higher law when in *Calvin's case*<sup>20</sup> he said that "the law of nature which is a part of the law

Coke (1610 A.D.).

of England, existed before any judicial or municipal law, and is immutable", and when, in *Bonham's Case*,<sup>21</sup> he uttered that "when an Act of Parliament is against common right or reason..... the common law will control it and adjudge such Act to be void".<sup>22</sup>

No less explicit was Chief Justice Hobart, when in 1614<sup>23</sup> he said "the laws of nature are immutable" and they were "the laws of laws", in the very same sense in which a Constitution, to-day, is regarded as the law of laws, for, Hobart C.J. held that "an Act of Parliament, made against natural equity, as to make a man judge in his own cause, is void in itself".

Writing in 1636, another Chief Justice, Finch C.J. (1636). Finch, carried on the trail by his assertion that—

".....Laws positive, which are directly contrary to the former (i.e. the law of reason) lose their force, and are no laws at all; as those which are contrary to the law of Nature".<sup>24</sup>

Even Blackstone, an advocate of Parliamentary supremacy, while summarising the laws of England, started with 'natural law', and his words which influenced Abraham Lincoln beyond the Seas are<sup>25</sup>—

"Man, considered as a creature, must necessarily be subject to the laws of his Creator..... This will of his Maker is called the law of nature.....

This law of nature being coeval with mankind, and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this....."<sup>26</sup>

One of the curious facts in the history of constitutionalism is the fact that though England never had a written Constitution for herself, the genesis of the transmutation of the doctrine of 'higher law' into an urge for the making of written Constitutions is to be found in England. Curiously, it was from the English practice of putting important matters and privileges into written documents having a superior sanctity that the concept of an organic instrument in the form of a written Constitution sprang up elsewhere.<sup>29</sup>

An important specimen of such writing is to be found in the borough charters of the feudal times, which incorporated the privileges conferred by the King or the lords upon the burghers.<sup>27</sup> Originating from such local charters, the practice of incorporating national demands in the form of charters or organic instruments has created occasional landmarks in the course of British constitutional history to such extent that these instruments are regarded by constitutional experts as written parts of the unwritten Constitution of Britain. As a recent writer<sup>28</sup> observes—

"The British Constitution is by no means wholly unwritten".

As a constitutional instrument to safeguard the liberties of the people in general, the earliest document which deserves mention is the Charter of Liberties, by the issue of which Henry I sought to purchase the support of his subjects. Maitland<sup>27</sup> describes this Charter as "the model for Magna Carta". By issuing this charter, the absolute monarch for the first time acknowledged that there were certain things which he could not do and that when such acts were done the barons might rightfully insist on a remedy.

Charter of Liberties  
(1100 A.D.).

Next comes the Magna Carta which has been rightly described as the "Bible of the English Constitution".<sup>28</sup> Its constitutional importance lies not so much in its contents,—because much of it relates to the contemporary evils of feudalism,—nor so much in that it added anything to the law of the land. As various commentators on the Great Charter have said, the object of the Charter was not to create new rights; the English people believed that the rights of the subject which were recited in the Magna Carta already existed at common law and that they only required to be recorded in an instrument between the King and his subjects so that they might not be violated in future.<sup>29</sup> Because the consent of the unwilling King was wrested by the people who proved to be stronger, in constitutional history, it serves as an instrument of limitation on power,<sup>30</sup> and, as an assertion of the rights of the people, it has served as a model of all subsequent Bills of Rights.

Magna Carta (1215  
A.D.).

To describe the Magna Carta as a feudal charter is to underestimate its importance in the history of political philosophy and constitutionalism.<sup>31</sup> It is not by accident that a famous English Judge, Bracton, could realise, within half a century of its adoption, that the Magna Carta was a 'charter of liberties'—*constitutio libertatis*.<sup>32</sup> If the words 'no freeman' in c. 29 (and similar clauses) of the Magna Carta referred only to the barons, they could not be clarified by substituting the words 'no man of what estate or condition he may be' in a statute of Edward III in 1354, which re-affirmed c. 29.

What value the Magna Carta can claim as an inspiration for a 'fundamental law' can be assessed only if we remember Coke's description of it as "the fountain of all the fundamental laws of the realm".<sup>33</sup> It was this concept of something more fundamental than ordinary laws, that led Cromwell, four centuries later, to assert, in support of his move for a higher law in the form of a written Constitution, that—

".....in every government there must be somewhat fundamental, some what like a Magna Carta, which should be standing and unalterable".<sup>34</sup>

to assert that there was, in the United States, "a right of privacy older than the Bill of Rights".<sup>63</sup>

It would be profitable to mention in this context that notwithstanding the adoption of the Ninth Amendment in the American Constitution, there has not been much use of this provision in the actual working of the Constitution, and such use has *not been necessary* because it is the Judiciary which has supplied the omission to enumerate any of the existing rights or the need for any new rights, by making a liberal interpretation of the enumerated rights.<sup>64</sup>

The American Supreme Court has, by its judicial gloss, added to the Bill of Rights various fundamental rights which the Founding Fathers omitted to insert in the Constitution,—not because they would not like those rights of the individual being safeguarded but because they could not envisage the need for specifically enumerating them in the Bill of Rights. The Supreme Court has, thus, deduced the following Rights from the existing Bill of Rights, even though they are, in fact, not specifically enumerated therein as in many later Constitutions:

A. *The freedom of association.* It is curious that a basic right, such as that of association, was not specifically provided for in the American Constitution. Its need was felt only in 1937, in connection with the status and legitimacy of trade unions.<sup>65</sup> It was then declared as a 'fundamental right'<sup>66</sup> but at that time it was asserted on the narrow foundation of the right of collective bargaining of employees against employers to protect themselves against unfair and arbitrary treatment.

The right of association, as a fundamental right, was placed on a proper pedestal in the United States, only in 1956-58. Since then it has been deduced from the freedom of speech<sup>67</sup> guaranteed by the First Amendment or, alternatively, from the word 'liberty' in the Fourteenth Amendment.<sup>68</sup> Thus, in a case from Alabama, the Supreme Court observed—

"It is beyond doubt that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech".<sup>69</sup>

In *Sweezy v. New Hampshire*,<sup>70</sup> it was observed—

"Our form of government is built on the premise that every citizen has the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights".<sup>71</sup>

Once formulated, freedom of association has been held to lie at the foundation of a free society in the same way as freedom of speech<sup>72</sup> and has been extended to include a right of privacy in one's association,<sup>73</sup> i.e., the right not to disclose one's association with other people.<sup>74</sup>

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B. 'The right to educate a child in a school of the parent's choice,'<sup>70</sup> and the right 'to study any language in a school.

These rights appear to have been deduced from the word 'liberty' in the Due Process Clause of the 14th Amendment. In *Meyer v. Nebraska*, thus,<sup>71</sup> the Court observed—

".....this Court has not attempted to define with exactness the liberty thus guaranteed. ....Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

It was made clear by saying<sup>72</sup> that the right of the teacher "to teach and the rights of parents to engage him to instruct their children.....are within the liberty of the Amendment".

In the *Pierce case*<sup>73</sup> the Court, speaking through McReynolds J., who had delivered the opinion in the *Meyer case*,<sup>74</sup> said—

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations".<sup>75</sup>

To say so, is not to deny any right of control to the State over children even where the parent's control would be detrimental to the national interests. This the Supreme Court pointed out in upholding the validity of a statute which forbade a parent guardian to permit a child to sell newspapers on the streets or other public places.<sup>76</sup>

"The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impending restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the State's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action".<sup>77</sup>

C. *The right of privacy.* A fundamental right to privacy of life has, similarly, been established,<sup>78</sup> being variously drawn from the Fourth Amendment (immunity of a person from 'unreasonable searches and seizures')<sup>79, 80</sup> and the Fifth<sup>81</sup> or Fourteenth Amendment<sup>82, 83</sup> (the 'liberty' clause). In *Wolf v. Colorado*,<sup>84</sup> the Court observed—

"The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment—is basic to a free society. It is

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therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law but *solely on the authority of the police*, did not need the commentary of recent history to be condemned as inconsistent with the conception of human history and the basic constitutional documents of English-speaking peoples".<sup>76</sup>

The most striking feature of this judicial evolution of the right of privacy is that though it was originally set up as a protection against arbitrary intrusion by the Police,<sup>76</sup> it has been developed into a general right of 'privacy and repose',<sup>77</sup> belonging to a householder as a protection against door-to-door solicitation of vendors of magazines<sup>77</sup> or other commercial literature<sup>77</sup> or against loudspeakers being operated on streets so as to cause nuisance to neighbouring householders;<sup>78</sup> the right of married couples to use contraceptives.<sup>79</sup>

It is in the same spirit of preserving the existing rights which may have escaped enumeration in the Bill of Rights that in s. 5(1) of the Canadian Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960, it has been provided—

"Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act."

The Indian Constitution, however, has discarded any saving clause to protect unenumerated rights as in the Ninth Amendment to the American Constitution. Hence, as has been pointed out earlier (p. 96, *ante*), our Supreme Court has held that in India a statute cannot be annulled on the ground that it contravenes a natural right, which is not to be found within the four corners of Part III of the Constitution.

This, however, would not lessen the task before the Court whenever an appeal is made by a litigant to a right which is not printed in bold letters in the several provisions of Part III. He may still contend that the right relied upon by him follows from any of those which are to be found on the text of the Constitution, and it will be the duty of the Court to determine whether the right alleged may be derived, by a proper interpretation, from any of the enumerated rights.

Before holding that the right so claimed is not covered by Part III of the Constitution, it is possible for our Courts—

(a) to inquire whether the said right "is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions",<sup>80</sup> or which are 'basic to a free society',<sup>80</sup> or 'the very concept of civilisation';<sup>81, 82</sup>

(b) to further inquire whether there is anything in the text of the relevant provisions of the Constitution which would preclude the liberal interpretation that the Court is called upon to make.

The obvious mode of enlarging the contents of Part III of our Constitution would, of course, be constitutional amendment. But so long as the attention of the Legislature is not drawn to the newer problems which are challenging modern civilisation, it cannot be urged that Courts in India should wash off their hands altogether merely because the framers of the Constitution could not foresee the new situations, or overlooked them.

The question was indeed raised in the very first case before the Supreme Court.—*Gopalan v. State of Madras*.<sup>52</sup> where the Court was called upon to interpret the expression 'personal liberty' in Art. 21.

Mukherjee, J., adopted the meaning given to the expression by *Dicey*<sup>53</sup> when he said—

"Personal liberty means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification".<sup>54</sup>

The majority of the Judges<sup>55</sup> laid emphasis upon the word 'personal' in the expression 'personal liberty' and the crux of this view is to be found in the judgment of Sastri, J.<sup>56</sup> His Lordship held that while 'liberty' consisted of "doing what one desires", the adjective 'physical' narrowed down that concept, to indicate "freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty". Sastri, J., in another context,<sup>57</sup> referred to the reason why the Drafting Committee of the Constituent Assembly had amended the original draft Constitution to qualify the word 'liberty' by the word 'physical', namely, that otherwise Art. 21 might be construed so widely as to include the freedoms already included in Art. 19. But it is one thing to say that Art. 21 comprises the residue of liberty that remains after excluding the seven freedoms included in Art. 19, and another thing to say that Art. 21 only covered freedom from bodily restraint and not the liberty to do anything one likes. Since Mukherjee J.<sup>58</sup> also held that 'physical liberty' in Art. 21 meant freedom from "physical restraint of the person by incarceration or otherwise", it would follow that according to the view of Mukherjee, J., too, the freedom to do anything was not included in Art. 21.

The patent defect of this interpretation is that there are a number of personal rights which a person in India as elsewhere enjoys under the common law, subject of course, to legislative restrictions. Some of these personal rights include<sup>59</sup>—

The right to eat, drink or smoke as one likes; the right to



work as much as he likes; or idle as much as he likes; the right to play or sleep when he likes.

These rights would not come under any of the clauses of Art. 19(1). Nor would they come within the restricted scope of Art. 21 as interpreted by Kania C.J., Shastri J. and Mukherjea J. If, now, Part III of the Constitution be regarded as an exhaustive enumeration of fundamental rights, the obvious result would be that the basic right to do as one likes could, in India, be invaded by the executive and police authorities without any legislative sanction,—a situation which no one would relish.

Kania C.J., seemed to have realised this. Hence, though adhering to the view that 'personal liberty' meant 'liberty of the physical body', he was constrained to observe that the right to eat or sleep or work as one pleases was included in that concept.<sup>57</sup>

Das J., made it more clear<sup>58</sup> when he said that the citizen's rights to do what he likes etc., were personal rights and that instead of attempting to enumerate them exhaustively they were included in Art. 21 by the use of the 'compendious expression personal liberty'.

That an adherence to the concept of 'personal liberty' as understood by Dicey<sup>59</sup> and Blackstone<sup>60</sup> was inadequate to meet the challenge of newer menaces to human freedom was ere long brought home to the Supreme Court in the cases of *Kharak Singh*<sup>61</sup> and *Sarwan Singh*.<sup>62</sup>

A. The question for determination in *Kharak Singh's case*<sup>63</sup> was whether domiciliary visits or 'surveillance' by the Police over a person at his house, without authority of law (the regulations under which it was purported to be done having been made without the authority of any law) constituted a contravention of Art. 21 of the Constitution.

The answer of the majority in the case<sup>64</sup> to this question does not appear to be clear enough. While Subba Rao J., for the minority, held that the right of privacy was included in the freedom of the person as guaranteed by Art. 21, the majority held that the right of privacy was "not a guaranteed right under our Constitution"<sup>65</sup> but nevertheless came to the conclusion that so far as the right of the people to be secured in their houses was concerned, it must be included in Art. 21, inasmuch as—

"an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a *common law* right of a man—an essential of ordered liberty, if not of the very concept of civilisation."

But, even having gone so far, the majority disagreed with the minority in holding that Art. 21 was aimed against physical

but not *mental* coercion. If this be the meaning of the majority judgment, it is difficult to agree with it.

In the United States, it has been established that the word 'liberty' in the Fourteenth Amendment includes "liberty of the mind as well as liberty of action".<sup>93</sup> Does the adjective 'personal' take away that meaning from the word 'liberty'?<sup>93a</sup> 'Person' certainly includes the mind and that is why mental coercion has been regarded by law to be as much an evil as coercion of the body, in excluding coerced confession.<sup>94-95</sup> It is true that the law cannot take any account of 'mere personal sensitiveness'<sup>96</sup> if that merely refers to sentiments or feelings which may vary from individual to individual and cannot form a standard, but if a restraint or coercion so operates that the subject cannot be said to retain a free mind, that would certainly be taken to be an invasion upon his freedom of the person or physical liberty. Thus, putting of one question may not constitute coercion, but prolonged interrogation, without offering opportunity of legal advice may,<sup>97</sup> and yet the majority in *Kharak Singh's case* held that the unlimited power of the Police to make inquiries from a suspect by tendering inquiry slips did not constitute a violation of physical liberty as guaranteed by Art. 21.<sup>98</sup>

Similarly untenable is the view of the majority<sup>99</sup> that though a power to make 'domiciliary visits at night' constituted an infringement of Art. 21, a power of 'secret picketing of the house of the suspect' did not. The majority held that the power of 'domiciliary visit' included the right to enter into the premises and therefore constituted an invasion as to the security in one's house, which the majority deduced from common law to be an ingredient of Art. 21. But what Art. 21 guaranteed was not freedom of the house, but freedom of the person. That freedom certainly included the freedom to be let alone in one's house, or the right to receive such visitors as he liked, except of course for criminal purposes. It is because of the interference of the first ingredient that a domiciliary visit must be regarded as a violation of personal liberty. On the same principle, when the Police keep a secret watch over the visitors of the suspect it should be considered to be an invasion of personal liberty of the subject if the power of picketing is unlimited and is used continuously, for a considerable length of time, and it should be unconstitutional if done without authority of law.

But whatever be the deficiencies of the majority opinion in *Kharak Singh's case*,<sup>100</sup> one thing is clear, namely, that the Supreme Court had come to realise—

(a) That 'personal liberty' in Art. 21 could not be confined to mere immunity from restraint of locomotion, but must include "the sanctity of a man's home" and immunity from "an intrusion

into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal".<sup>99</sup>

(b) That the adjective 'personal' was used in Art. 21, not to abridge the content of 'liberty', but only to distinguish the scope of Art. 21 from that of Art. 19, which already covers some aspects of 'liberty':

".....the qualifying adjective has been employed in order to avoid overlapping between these elements or incidents of 'liberty' like freedom of speech or freedom of movement etc. already dealt with in Art. 19(1) and the 'liberty' guaranteed by Art. 21....."<sup>100</sup>

B. Subba Rao J., (as he then was), who was in the minority in *Kharak Singh's case*,<sup>100</sup> gained majority in *Satwant Singh's case*,<sup>101</sup> so that the decision of the majority in *Satwant's case* is practically a reiteration and application of his views in *Kharak Singh's case*.<sup>100</sup>

The question for decision was whether the refusal or withdrawal of a passport by the administrative authority to travel abroad was an infringement of Art. 21 since, admittedly, there was no existing law placing restrictions on the citizens' right to go out of the country. It was not possible to deduce any fundamental right to travel abroad from Art. 19(1)(d) since that provision guaranteed only the right "to move freely throughout the territory of India".

The question was whether it could be predicated that the right of movement was included in the Indian Constitution in two articles, (a) movement within India, in Art. 19(1)(d), and (b) movement out of India, in Art. 21. This question could not be answered in the affirmative if the *Gopalan* view<sup>102</sup> of Art. 21 being limited to freedom from physical incarceration was adhered to. Subba Rao C. J. put an end to the seventeen-year-old *Gopalan* view<sup>102</sup> by reiterating his minority opinion in *Kharak Singh's case*<sup>100</sup> that 'personal liberty' in Art. 21 of our Constitution was as wide as the word 'liberty' in the 5th and 14th Amendments to the American Constitution as explained in decisions such as *Munn v. Illinois*,<sup>103</sup> in these words:

".....liberty in our Constitution bears the same comprehensive meaning as given to the expression 'liberty' in the 5th and 14th Amendments to the U. S. Constitution and the expression 'personal liberty' in Art. 21 only excludes the ingredients of 'liberty' enshrined in Art. 19 of the Constitution. In other words, the expression 'personal liberty' in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19."<sup>103</sup>

What is more important from our instant point of view is that in *Satwant's case*,<sup>101</sup> our Supreme Court could evolve a funda-

mental right of a citizen to move out of India, even though there was no specific enumeration of such right in Part III of the Constitution.

I shall now refer to the demand for some new rights which could be met by our Supreme Court, in whole or in part, by the application of the canon of liberal interpretation:

A. Let us start with the *right to privacy*.

I have already pointed out (p. 165, *ante*) how the American Supreme Court has developed a general right of privacy and repose in one's home, or a right to be let alone.<sup>102</sup>

Starting with privacy against arbitrary intrusion by the police<sup>103</sup> as a corollary from the immunity from 'unreasonable search and seizure',<sup>73-8</sup> the Court has by this time deduced various aspects of privacy from other freedoms enumerated in the American Bill of Rights,<sup>104</sup> so as to comprise—

- (i) Privacy of association.<sup>105</sup>
- (ii) Privacy in public expression.<sup>106</sup>
- (iii) Privacy of the body as a protection against self-incrimination.<sup>107</sup>
- (iv) Marital privacy.<sup>108, 109</sup>
- (v) A 'privacy of life'<sup>110</sup> which protects a person from arbitrary intrusion by the Police (*e.g.*, without a warrant) even when he is at another man's house<sup>110</sup> or at a public telephone booth.<sup>110</sup>
- (vi) A privacy of a householder against loudspeakers,<sup>111</sup> or against door-to-door solicitation of vendors of magazines or other commercial literature.<sup>77</sup>

Our present object is not to ascertain whether all the above aspects of privacy can and should be introduced in India, but whether a right of privacy, in general, can be deduced from Art. 21. The question of unreasonableness of any restriction imposed upon such right could not, of course, be questioned under Art. 21 (so long as *Gopalan*<sup>82</sup> stands); but if it is acknowledged that the 'right to be let alone' is included in Art. 21, people would be in a position to resist invasion of such right by the administrative and police authorities without a sanction of law.

When the question first arose, Jagannadhas, J., speaking for the Court in *Sharma v. Satish*,<sup>112</sup> threw cold water on any such suggestion in these words:

"When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

It would really be an unfortunate state of affairs if it was not possible to assert, in India, a fundamental right to privacy against unlawful governmental intrusion when such a right is regarded as a basic condition of the 'inherent dignity' of the human family and is declared in Art. 12 of the Universal Declaration of Human Rights, in these words—

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. ...."

To say that there is no specific guarantee against 'unreasonable search and seizure' in the Constitution of India is not a complete and conclusive answer to the question whether it is open to our Judges to draw a right to privacy in the sense in which it is being discussed now, from some of other provision of the Constitution as it exists.

The reason is, as Douglas J. explained,<sup>112</sup> that it is only a 'part' of the claim to privacy which is included "in the prohibition of the Fourth Amendment (*U. S. A.*) against unreasonable searches and seizures". The other ingredients of the right to privacy according to Douglas J. are—

"He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. .... The present case involves a form of coercion to make people listen".<sup>113</sup>

The learned Judge, in the instant case<sup>114</sup> deduced a freedom not to listen to amplifying radio programmes in passenger transport vehicles, as an ingredient of the right to privacy; and all these ingredients, he asserted, would follow from the guarantee of 'liberty' in the Fifth and the Fourteenth Amendment:

"Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."

It has just been seen that one of the facets of the right of privacy, namely, freedom from domiciliary visits by the police to one's residence at night<sup>115</sup>, has already been drawn from the guarantee of 'personal liberty' in Art. 21, in *Kharak Singh's case*.<sup>90</sup> What is noticeable on this point is that once the narrow concept of 'personal liberty' in the case of *Gopalan*<sup>92</sup> has been exploded, it would be only reasonable to anticipate that the Supreme Court would be in a position to admit other elements of the right to privacy also within the ambit of Art. 21. If it is held, as in *Kharak Singh's case*,<sup>90</sup> that 'personal liberty', in Art. 21, means something more than mere absence of 'physical restraint', the door is opened for letting in the further American propositions—

(a) that it includes the right of every individual "to the possession and control of his own person, free from all restraint and interference, unless by clear and unquestionable authority of law";<sup>118</sup>

(b) that "the specific content and incidents of this right must be shaped by the context in which it is asserted".<sup>119</sup>

#### B. Wire-tapping.

Another modern menace to privacy is wire-tapping, which has been made possible by the development of the science of electronic devices for 'eavesdropping,' e.g., intercepting telephonic communications.

In this sphere, there is a serious conflict between the individual's interest to defend his privacy and the public interest in the detection of crimes, which would *prima facie* justify the means by which it was effected. It is no wonder, therefore, that, on this question, the American Supreme Court has had to struggle for long against itself as well as against State Courts. In 1928, the Court held<sup>117</sup> that the device of wire-tapping did not violate the right against 'unreasonable searches and seizures' guaranteed by the 4th Amendment because no search or seizure was involved in the interception of a telephonic message nor the right against self-incrimination because the sender of the message was not compelled by the State to talk to anybody. The Court failed to catch hold of the 'liberty' clause, but suggested that the acceptance of evidence obtained by wire-tapping could be prohibited by legislation.

This was followed by Congress enacting the Federal Communications Act, 1934 which forbade a person to intercept any 'communication' and to disclose any such intercepted communication to any person, without authorisation by the sender. The Court, ere long, held that evidence obtained by wire-tapping,<sup>118</sup> e.g., interception of a telephone talk,<sup>119</sup> was inadmissible in federal Courts.

Then followed a long period of struggle to determine whether the federal Act of 1934 was binding on State Courts.

But eventually, as late as 1968, the Supreme Court has held, disapproving its earlier decision,<sup>120</sup> that a Judge of a State Court could not be an accomplice in the wilful transgression of a federal statute because the federal statutes are binding on all courts, by reason of Art. VI of the Constitution. The result is that evidence obtained by wire-tapping is inadmissible, whether in the federal or State Courts, in America. Hence, even though it is,

in fact, resorted to by the Police for the purposes of investigation, the evidence so gathered cannot be used to convict the accused.

Australia is in advance of many countries in this matter, having enacted the Telephonic Communications (Interception) Act, 1960, which has been enforced by the Court.<sup>121</sup>

The question of wire-tapping, tape-recording or the like has not yet been examined by our Supreme Court from the constitutional standpoint. In *Yusufalli v. State of Maharashtra*,<sup>122</sup> a case of tape-recording was brought before the Court. The only question which the Court answered in this case is whether the evidence obtained by such means could be used against the accused within the scope of s. 162 of the Criminal Procedure Code, and the Court answered this question in the affirmative. No question of constitutionality was raised in this case. But it is noticeable that the Court expressed its disapproval of such practice, in these words—

"In saying so, the Court does not lend its approval to the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording."

But if the Court feels, as in the *Maharashtra case*<sup>122</sup> just cited, that it is unconscionable or against 'common right and reason' to obtain evidence by such means to convict a person, a bolder pronouncement is to be made on some future occasion. Could not the Court bring it within the fold of 'personal liberty' in Art. 21 as it had done as regards 'police surveillance' in *Kharak Singh's*<sup>123</sup> case, to demand specific legislative sanction for resorting to such means for investigation? And if any such legislation is eventually undertaken, the question may, once again, be raised whether such legislation, reopening the *Gopalan*<sup>82</sup> foreclosure, would constitute an unreasonable restriction upon an individuals' freedom of speech, as suggested by Subba Rao J. in *Kharak Singh's case*.<sup>123</sup>

As to the applicability of Fundamental Rights it should be mentioned that the scheme of the *Indian Constitution* has obviated one question which has troubled the Judiciary in the United States for long, namely, whether the Bill of Rights are applicable to the States or are addressed only to the Federal Government. In the *U.S.A.*, it was originally held that since the States have their own Constitutions, the Bill of Rights appended to the federal Constitution did not operate as limitations upon the States.<sup>124</sup> It is only by the application of judicial quibbles for over a century that almost all the

Fundamental Rights constitute limitations upon both Federal and State Governments.

provisions in the Bill of Rights incorporated in the federal Constitution have been held to be binding on the States as well,<sup>125</sup> though occasionally the question is raised in particular cases, even now. But in India, excepting Jammu and Kashmir, no other State has any Constitution of its own, and there is little doubt that the Fundamental Rights embodied in Part III of the Constitution of India are binding both upon the Union and States<sup>126</sup>; of course, in the case of the State of Jammu and Kashmir, the Fundamental Rights as specified in Part III of the Constitution of India may be modified<sup>127</sup> by the President of India, in the manner laid down in Art. 370(3) of that Constitution itself.

It has already been explained (Lecture III, pp. 70 *et seq.*, *ante*) that a written Constitution has been historically devised as a limitation upon the exercise of arbitrary power by any limb of the State and a Bill of Rights guaranteed by such Constitution is intended to operate as a limitation upon the exercise of unlimited power by any of the organs,—executive, legislative or judicial,—through which the State can act.<sup>128</sup> In short, fundamental rights operate as a limitation upon 'State action', collectively and individually.

In the *United States*, the doctrine of State action had to be evolved primarily by reason of the word 'State' in the Fourteenth Amendment to the Constitution which reads as follows:

U. S. A.

".....nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As has been explained earlier, the object of Fundamental Rights is to guarantee certain minimal rights of the individual as against collective encroachment through the State which wields the coercive power of the political society, or more strictly, enforces the will of the majority.<sup>129</sup> The guarantee of 'due process' and 'equal protection' in the Fourteenth Amendment is therefore addressed against the State. But the object of the guarantee would have been defeated if it could not bring within its sweep all the organs of the State and all the agencies and instrumentalities through which the State acts in a modern political system.

The comprehensiveness of the operation of the Fundamental Rights included in the 14th Amendment against all forms of State action was thus formulated in the early case of *Ex parte Virginia*<sup>130</sup> in the following words, which have been reiterated in later cases:

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision (14th Amendment), therefore,



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## Articles

### Of Sovereignty and Federalism

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Victims of government-sponsored lawlessness have come to dread the word "federalism." Whether emblazoned on the simple banner of "Our Federalism"<sup>1</sup> or invoked in some grander phrase,<sup>2</sup> the word is now regularly deployed to thwart full remedies for violations of constitutional rights. Consider, for example, the Burger Court. Rallying under flags of federalism, the Justices pushed back remedies for segregation in public schools,<sup>3</sup> denied relief to citizens threatened by racially discriminatory police brutality,<sup>4</sup> cut back federal habeas corpus for state prisoners convicted

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This essay is dedicated to the memory of my teacher, colleague, and friend, Robert M. Cover.

1. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971).

2. One of the Supreme Court's favorite formulations trumpets "principles of equity, comity, and federalism." See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976).

3. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (invoking "local autonomy" and citing federalism principles of *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

4. See, e.g., *Lyons*, 461 U.S. at 112; *Rizzo*, 423 U.S. at 379-80; cf. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (using "federalism" to deny relief to citizen threatened by racially discriminatory administration of criminal justice).

in tainted trials,<sup>5</sup> and forced lower federal courts to dismiss a broad range of suits challenging unconstitutional state conduct.<sup>6</sup>

So too, "sovereignty" has become an oppressive concept in our courts. A state government that orders or allows its officials to violate citizens' federal constitutional rights can invoke "sovereign" immunity from all liability—even if such immunity means that the state's wrongdoing will go partially or wholly unremedied.<sup>7</sup> When the national government invades constitutionally protected zones, "sovereign" immunity is once again wheeled out to defeat the remedial imperative.<sup>8</sup>

To be sure, our Constitution does embody structural principles of federalism and sovereignty. Yet that same document also guarantees certain fundamental individual rights against government. Is the Constitution therefore divided against itself? Is the way in which it constitutes political bodies at war with the legal rights that it constitutionalizes?

In this essay, I hope to offer a neo-Federalist answer—one that allows us to see how the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights.<sup>9</sup> I seek to counter the Supreme Court's version of federalism and

5. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

6. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Younger v. Harris*, 401 U.S. 37 (1971).

The Court also invoked "federalism" to excuse crabbed definitions of individual constitutional rights against states. See, e.g., *Rodriguez*, 411 U.S. at 44, 50; *infra* note 252. This essay, however, focuses on the implications of federalism for remedies for admitted violations of constitutional rights.

7. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Louisiana v. Jumel*, 107 U.S. 711 (1883).

8. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

9. I use the term "neo-Federalist" for three reasons. First, the term highlights the emphasis I place in my attempts to explicate the Constitution on *The Federalist* and other writings of Federalists like Alexander Hamilton, James Madison, and James Wilson. My neo-Federalism, however, sharply contrasts with the new federalism championed by the new Chief Justice. While purporting to follow the original intent of the framers of the Constitution (the Federalists), William Rehnquist has worked to implement a vision far more congenial to those who opposed the Constitution (the so-called Anti-Federalists). See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). The irony of the Chief Justice's rhetoric is enriched by the fact that the first "Federalists" were themselves arguably guilty of a similar rhetorical sleight of mind in 1787. While purporting to follow pure "federal" principles (hence their self-description), Hamilton *et al.* worked to implement a vision with strong "national" (in contradistinction to "federal") elements: They scrapped a pure federal league (the Articles of Confederation) for a Constitution founded on the sovereignty of a national People. See *infra* text accompanying notes 91-170.

Second, the neo-Federalist label flags the fact that I am reading Federalist writings at a distance of two centuries and through a lens colored by intervening historical events (such as the Civil War, Reconstruction, and the civil rights movement) and current schools of legal thought (such as legal process and law and economics). Neo-Federalism attempts to offer a *useable* past—a set of Federalist doctrines in harmony with post-Federalist developments and the realities of twentieth-century life and law.

Finally, the neo-Federalist tag connects this essay to an earlier essay, Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985). Both works are part of a larger project consisting of a series of neo-Federalist essays on the structure of the Constitution.

sovereignty with the framers' version—to replace “Our Federalism” with their federalism, and government sovereignty with popular sovereignty.

Section I of this essay revives the Federalist ideas that true sovereignty in our system lies only in the People of the United States, and that all governments are thus necessarily limited. These ideas pervade the Constitution and inform its structure of federalism. In the martial language of the eighteenth century, each limited government, state and national, can serve as a “sentinel” to “check” the other’s “encroachments” on the constitutional rights reserved by the sovereign People.<sup>10</sup> Guided by emerging principles of agency law and organization theory, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other’s compliance with the corporate charter established by the People of America.<sup>11</sup>

Some of the terrain explored in Section I should be familiar ground to students of constitutional law today. Indeed, it is precisely the familiarity of that section’s basic ideas that sharpens my neo-Federalist critique of current legal ideas in subsequent sections of this essay. Although judges and scholars often chant the mottoes of popular sovereignty and limited government, they have developed specific legal doctrines and thought patterns that misapply these basic ideas. In Sections II and III, I examine two areas of misapplication, involving governmental immunities and constitutional remedies.

In Section II, I argue that no government entity can enjoy plenary “sovereign” immunity from a suit alleging a violation of constitutional right. “We the People of the United States,” through the Constitution, have delegated limited “sovereign” powers to various organs of government; but whenever a government entity transgresses the limits of its delegation by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative “sovereign” immunity it might otherwise possess. Simply put, governments have neither “sovereignty” nor “immunity” to violate the Constitution. Whenever they do act unconstitutionally, they must in some way undo the violation by ensuring that victims are made whole. In many cases, only governmental liability can provide this assurance.<sup>12</sup>

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10. See, e.g., *THE FEDERALIST* No. 51, at 322–23 (J. Madison) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition].

11. Contemporary organization theory’s emphasis on both agent incentives within organizations and competition among organizations meshes well with the Federalists’ own interest in structuring incentives to translate private interest into public welfare. See O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288 (1980); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976).

12. Where government liability is not necessary to guarantee victims full redress (because, for example, other remedies against individual officers will fully compensate victims), the government

In Section III, I argue that a healthy competition among limited governments for the hearts of the American People can protect popular sovereignty and spur a race to the high ground of constitutional remedies. Each government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government's misconduct. This argument both invokes and inverts conventional thinking about 42 U.S.C. section 1983, which provides a federal cause of action—a legal “sword”<sup>13</sup>—to victims of unconstitutional state conduct.<sup>14</sup> We are quick to see the many ways in which the national government can bid for its citizens' political affections by aiding those whose constitutional rights have been, or are about to be, invaded by persons acting under color of state law. Yet we often fail to note that federalism cuts both ways—that *states* can gain political goodwill by arming their citizens with remedies for constitutional wrongs threatened or perpetrated by *federal* officials. Perhaps this failure stems from the fact that no state has ever adopted a general “converse-1983”<sup>15</sup> cause of action expressly allowing suit against any federal agent who acts unconstitutionally. Yet state “private law” protections of liberty and property have historically furnished countless occasions for vindicating complementary constitutional “public law” protections of liberty and property against the federal government. For example, until the 1971 case of *Bivens v. Six Unknown Federal Agents*,<sup>16</sup> the only general damage remedy for a citizen victimized by federal violations of the Fourth Amendment derived from state trespass law. Moreover, if a single state were tomorrow to adopt a suitably worded converse-1983 statute—and the federal judiciary were to uphold the statute (as it should, I shall argue)—then competitive pressures among states might well goad other states to join the remedial campaign and enact like statutes. This interstate dynamic bears some similarity to the “race to the top” posited by many corporate law scholars.<sup>17</sup>

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may choose to immunize itself. See *infra* text accompanying note 262.

13. Cf. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (arguing that courts should infer federal causes of action directly from Constitution).

14. 42 U.S.C. § 1983 (1982) reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15. I use the term “converse-1983” to refer to any statute that would invert § 1983 by providing a general state-law-created cause of action against persons acting unconstitutionally under color of federal law. See *infra* text accompanying notes 343–60.

16. 403 U.S. 388 (1971).

17. See, e.g., R. WINTER, *GOVERNMENT AND THE CORPORATION* (1978); Easterbrook & Fischel, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Winter, *State Law*,

Properly understood, federalism and sovereignty need not stand as cruel bars to full redress for unconstitutional conduct. Rather, they were originally understood to be, often have been, and can become once again, the very tools to right government wrongs. If federalism and sovereignty seem perverse today, it is only because our jurisprudence has perverted them, clumsily attempting to hammer legal devices for abused citizens into doctrinal defenses for abusive governments.

## I. THE SOVEREIGNTY OF THE PEOPLE

A full constitutional account of sovereignty and federalism calls for two complementary inquiries. One inquiry is rather formal: We must examine the compact set of words that we call the Constitution. The other inquiry is broader: We must come to terms with some of the great historical events and symbols lying beyond and behind the words themselves—events and symbols that constitute the shared historical legacy of twentieth century Americans, and that have constituted us as the People that we are today.<sup>18</sup> In particular, we must confront the momentous constitutional issues at the heart of the American Revolution and the Civil War. Each of these epic military and political struggles can be seen as part of a constitutional debate about sovereignty and federalism.

In the Revolution and its wake, constitutional debate focused on whether sovereignty resided in government or in the People, and on how federalism should operate within Empire and Confederation. The Federalist Constitution responded to this debate with its own distinct vision of sovereignty and federalism. Yet that vision did not go unchallenged, and ratification did not end constitutional debate. Instead, extreme states' rights theorists, intellectual heirs of Anti-Federalist opponents of the Constitution, waged an increasingly fierce debate with the keepers of the Federalist flame over constitutional first principles. That debate, culminating in the Civil War, focused on whether sovereignty resided in the People of each state or in the People of the United States as a whole, and on how federalism should operate within Union.<sup>19</sup> The struggle ended with a re-

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*Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

18. Cf. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic . . .").

19. Of course, in referring to the "Civil War" and not the "War Between the States," I am implicitly affirming the correctness of the nationalist view that sovereignty resided in the People of the United States as a whole. See *infra* text accompanying notes 91–170. If the People of each state were sovereign, the War would be most appropriately viewed as an international dispute between sovereigns, and not an internal (civil) war (or, more precisely still, a rebellion). Thus, the dispute about the dispute's label is microcosmic of one of the main constitutional issues underlying the dispute itself. See generally J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 48–73 (rev. ed. 1963) ("The Legal Nature of the Civil War"). But see A. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE*

affirmation and strengthening of the Federalist vision in the Reconstruction Amendments.

### A. *The Revolutionary Debate*<sup>20</sup>

Ideas mattered to our revolutionary forebears. Colonial leaders took up arms in 1776 not simply because they found Parliament's actual policies during the 1760's and 1770's intolerable in fact, but also because—as a matter of principle—they could not accept the British idea that Parliament had legitimate authority to do anything it wanted to the colonies. Even worse than what Parliament had done in the past was what Britons claimed it could in theory lawfully do in the future.<sup>21</sup> In the war of ideas between Britain and America that preceded and inspired the military struggle over independence—an intellectual war whose battle lines were drawn over concepts of “*imperium*,” and “*empire*”—a distinctly American vision of sovereignty and federalism began to crystallize.

#### 1. *British Ideas*

The conventional British position understood “sovereignty” as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself voluntarily chose to observe. To try to divide or limit sovereignty in any way was to create the “political monster” or “hydra” of “*imperium in imperio*”—“the greatest of all political solecisms.”<sup>22</sup>

But where did this sovereignty reside in Britain? In the crown, of

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WAR BETWEEN THE STATES (Philadelphia 1868) (account of Vice President and chief constitutional theoretician of so-called Confederate States of America).

20. The history of the revolutionary and Confederation periods presented below is necessarily schematic and stylized. For a more nuanced and complete account, see B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967), and G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969), on whom I have relied heavily.

21. Also, many colonists feared that any failure to assert their rights could be deemed a constructive waiver whose precedential force in a system governed by an unwritten constitution might enlarge future governmental power by a sort of adverse possession. See 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 170 n.2 (1833) (quoting Edmund Burke); J. TAYLOR, *CONSTRUCTION CONSTRUED* 54 (Richmond 1820); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Thought*, 30 STAN. L. REV. 843, 875-79 (1978). The Boston Tea Party, for example, was held in response to a nominal tax on tea that had recently been lowered by the British, in what the outraged Bostonians viewed as a sly attempt to acclimate colonists to the principle of Parliament's plenary power of taxation. J. BLUM, E. MORGAN, W. ROSE, A. SCHLESINGER, K. STAMPP & C. WOODWARD, *THE NATIONAL EXPERIENCE* 94 (1973).

22. See, e.g., *THE FEDERALIST* No. 15, at 108 (A. Hamilton); *id.* No. 44, at 287 (J. Madison); B. BAILYN, *supra* note 20, at 198-229; G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 162-75 (1981); G. WOOD, *supra* note 20, at 344-54.

course, argued royal absolutists in the early seventeenth century.<sup>23</sup> God Almighty—the indivisible, unlimited sovereign of the universe—had vested indivisible, unlimited temporal authority in the King, God's sovereign agent on earth.<sup>24</sup> After the English Civil War of the 1640's and the Glorious Revolution of 1688, however, few in England embraced royal supremacy. According to the new understanding, ultimate political authority derived not from the divine right of kings, but from the consent of the governed. Legitimacy flowed up from the People, not down directly from God.<sup>25</sup> Yet the unorganized polity at large could not effectively wield sovereign power on a day-to-day basis in fashioning and administering laws. At best, the People could assert their power in those rare meta-legal moments, like the Glorious Revolution itself, when one monarch was ousted and another consented to. In ordinary times, then, where did effective sovereignty lie?

By the eighteenth century, the answer in Britain seemed clear: Sovereignty resided in the King-in-Parliament, that indivisible entity consisting of King, Lords, and Commons. Since all three "estates," or social orders, of the realm—the one, the few, and the many—were "virtually represented," the King-in-Parliament became the virtual embodiment of the abstract sovereignty of the People.<sup>26</sup>

For Britons, the beauty of the system lay in its perfect symmetry and balance. Although the theoretical power of the King-in-Parliament was necessarily boundless—as Samuel Johnson put it, "In sovereignty, there are no gradations. . . . [T]here can be no limited Government"<sup>27</sup>—in

23. Robert Filmer was a leading exponent of this view. See B. BAILYN, *supra* note 20, at 199; G. WOOD, *supra* note 20, at 346. The work of the sixteenth century French jurist Jean Bodin is also of interest here. See J. BODIN, *THE SIX BOOKES OF A COMMONWEALE* (K. McRae ed. 1962).

24. Here we see the theological roots of both the absolutist definition of sovereignty, and its royal location. Although medieval scholastics like Aquinas and Anselm had more modest views of secular sovereignty than Bodin, Anselm's famous ontological proof of the existence of God and Aquinas' emphasis on the necessary omnipotence of God anticipate Bodin.

25. Again, however, theological arguments—in this case based on Puritan notions of the equality of all individuals before God—appear to have influenced sovereignty theory. See A. McLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 22 (1961). Thomas Hobbes appears in this light as a transitional figure, reaching conclusions that resemble royal absolutism, but deriving those conclusions from social contract and not divine right. See T. HOBBS, *LEVIATHAN* (London 1651). John Locke's work has a more modern cast: Beginning with contractarian premises similar to Hobbes', Locke repudiates monarchial absolutism and champions parliamentary supremacy and popular sovereignty. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (London 1689).

26. Here too, theology may have helped shape sovereignty thinking: Consider the trinitarian doctrine of three-in-one indivisibility and the eucharistic notions of the wafer's actually or symbolically embodying Christ.

27. S. JOHNSON, *Taxation No Tyranny*, in *POLITICAL WRITINGS* 401, 423 (D. Green ed. 1977) (Yale Ed. of the Works of Samuel Johnson Vol. X). Sir William Blackstone's famous *Commentaries* also featured a powerful exposition of parliamentary sovereignty. In every government, "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside." 1 W. BLACKSTONE, *COMMENTARIES* \*49. Since the "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, re-

practice the balance of competing forces within the mixed system of government would preserve liberty. No law could be enacted without the approval of all three orders of society, and thus no one estate could tyrannize the others. The excellence of the British Constitution lay in the way in which it *constituted* the King-in-Parliament; by blending all three classical forms of government—monarchy, aristocracy, and democracy—the British Constitution achieved an Aristotelian “mean of means” that would avert the degeneration to which each pure “unmixed” form of government was vulnerable.<sup>28</sup>

## 2. *The American Response*

Rather different ideas were brewing on the other side of the Atlantic. During the 1760's and 1770's, many colonial leaders argued that various parliamentary enactments were void because they violated higher principles of the British Constitution reflected in revered texts like Magna Charta, and in fundamental unwritten and common law traditions. These colonists came to define the British Constitution not merely as the structure and arrangement of governmental institutions, but also as a set of substantive legal principles limiting the legitimate exercise of government power.<sup>29</sup> The British found such colonial notions curious at best. Since the King-in-Parliament was itself the virtual embodiment of the British Constitution and the British People, how could any principle, however venerable, supersede that body's sovereign will? Talk of “void” parliamentary enactments was nonsense—or treason.<sup>30</sup>

### a. *The Corporate Analogy*

The colonial experience during the seventeenth and eighteenth centuries had prepared the ground for revolutionary ideas. In many colonies, written “constitutions” prescribed substantive limits on the powers of the colonial government.<sup>31</sup> Several of these colonial “constitutions” had originally

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pealing, reviving, and expounding of laws” resided in Parliament, *id.* at \*160, that body could “do everything that is not naturally impossible. . . . [W]hat the parliament doth, no authority upon earth can undo.” *Id.* at \*161.

28. Without the competing tugs of aristocracy and democracy, kingship would easily slide into monarchical tyranny; so too, if left unchecked, aristocracy would decay into oligarchy; and democracy into mob rule. See B. BAILYN, *supra* note 20, at 66-93, 175-229; G. WILLS, *supra* note 22, at 97-107; G. WOOD, *supra* note 20, at 18-28, 197-206, 344-54.

29. See B. BAILYN, *supra* note 20, at 175-98; Grey, *supra* note 21.

30. In the words of the 1766 Declaratory Act that grated on colonial ears, Parliament “hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever.” An Act for the Better Securing the Dependency of His Majesty's Dominions in America Upon the Crown and Parliament of Great Britain, 1766, 6 Geo. 3, ch. 12.

31. See Grey, *supra* note 21, at 866 n.99.



been designed as corporate charters. The original Massachusetts Bay Company Charter, for example, provided for a "governor," a "deputy governor," eighteen "assistants," and regular "general court[s]" of freemen of the company—corresponding to what we would today refer to as a "private" corporation's president, vice-president, board of directors, and shareholder meetings, respectively.<sup>32</sup> The colonists generally came to understand these corporate charters as "constitutions" in the modern American sense—foundational political instruments constituting and limiting governmental power. The people of Massachusetts saw their charter not simply as prescribing the governance structure of a profit-seeking entity, but as establishing the framework of colonial mixed government, blending powers of the one (the "governor"), the few (the "assistants") and the many (the "freemen").<sup>33</sup>

Ordinary language eased this assimilation. Like Magna Charta itself, the Massachusetts document was a "great *charter*"—it was a written "compact" or "contract" among early inhabitants creating the "corporate" entity of the colonial "*body politic*." Contemporary corporate law also emphasized the basic continuity between "municipal" and "private" corporations, entities that might today be seen as sharply distinct.<sup>34</sup> No general incorporation laws existed then. Each corporation came into being only by special act of the sovereign; each corporate charter—whether incorporating a profit-seeking joint venture, a charitable organization,<sup>35</sup> a municipality, or a colonial government—was a tailor-made and limited grant of special sovereign privileges. As James Iredell wrote in 1793:

The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense "a corporation." . . . In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed "corporations."<sup>36</sup>

The analogy between corporate charters and political constitutions had

32. See A. McLAUGHLIN, *supra* note 25, at 38–65.

33. See B. BAILYN, *supra* note 20, at 190. In Connecticut, the original corporate charter issued by the Crown in 1662 served as the state constitution throughout the Revolution and until 1818. See G. WOOD, *supra* note 20, at 276–78. Rhode Island's colonial corporate charter lasted even longer—until Dorr's Rebellion in the 1840's. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 1 (1849).

34. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 166–69 (1973).

35. In addition to the established Anglican Church incorporated by law, many Puritan churches had "self-incorporated"—formed themselves into *bodies* of worship—by a mutual compact among individual Christians covenanting with each other and with God. This blending of covenant theology and social contract theory could not help but influence political ideology in the city on the hill. See A. McLAUGHLIN, *supra* note 25, 13–85.

36. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.).

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profound implications. Not all of these implications were universally perceived by colonial leaders, even as late as 1776. But slowly, subtly, the corporate analogy seeped deep into the thought patterns of the men who would eventually label themselves Federalists in 1787.

First, the analogy suggested that government power could be strictly bounded by its "charter." Just as corporate officials lacked lawful authority to go beyond the scope of their corporate charter, so conduct by government officials that transgressed substantive "constitutional" limitations was null and void. Herein lay fertile seeds of limited government—of the American conception of a constitution as a fence around, and not merely the frame of, government.<sup>37</sup>

Second, the fence could be maintained by judges following an emerging body of agency law doctrine. Like corporate officers, government officials were merely agents of principals who had prescribed limits on the agents' power in the founding charter. Judges could enforce these limits by denying legal effect to the constitutionally unauthorized acts of government agents. Thus were laid the foundations of judicial review. Note how agency principles carry the bulk of the argument in the key passages of *The Federalist* No. 78's classic defense of judicial review:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>38</sup>

Finally, the corporate analogy helped to revolutionize the concept of "sovereignty" itself. Colonial governments undeniably fashioned and applied legal rules that directly regulated day-to-day life in the colonies. In this sense, they seemed to wield sovereign power. Yet the very notion of sovereignty as then understood in Britain suggested that sovereignty was unlimited. How, then, could the power of colonial governments be legally limited if the sovereign was by definition above the law? The ultimate American answer, in part, lay in a radical redefinition of *governmental*

37. See A. McLAUGHLIN, *supra* note 25, at 38–65, 104–28.

38. THE FEDERALIST No. 78, at 467 (A. Hamilton); see also R. BERGER, CONGRESS V. THE SUPREME COURT 14–16, 170–76 (1969) (noting agency law roots of judicial review); A. McLAUGHLIN, *supra* note 25, at 104–28 (similar).

"sovereignty." Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament,<sup>39</sup> so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself.

Yet Americans' redefinition of governmental sovereignty was only part of the answer, for they continued to subscribe to the British view that the source of delegated power—the *true* sovereign—must necessarily enjoy the essential attributes of indivisible, final, and unlimited authority.<sup>40</sup> Who, then, was the ultimate unlimited sovereign whose limited delegations both created and bounded government power? The American answer was at once traditional and arresting: True sovereignty resided in the People themselves. It was traditional, because one strand of Lockean thought had long recognized the inalienable (i.e., non-delegable) right of the People to alter or abolish their government through the exercise of the transcendent right of revolution—a right that the British People had exercised in the seventeenth century, and that Americans invoked in 1776.<sup>41</sup> It was arresting, because eighteenth-century British theorists like William Blackstone had blunted the possible radical implications of Locke by insisting that the King-in-Parliament—the government—virtually embodied the sovereignty of the People.<sup>42</sup> In dramatic contrast, the American understanding drove

39. Or, it seems, by the King alone via the royal prerogative. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 448 (opinion of Iredell, J.); L. FRIEDMAN, *supra* note 34, at 166 n.30.

40. See, e.g., THE FEDERALIST No. 15, at 108 (A. Hamilton); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34, 169, 172, 188, 287 (M. Farrand rev. ed. 1937) [hereinafter M. Farrand] (remarks of Gouverneur Morris, Charles Pinckney, James Wilson, William Paterson, and Alexander Hamilton); 2 *id.* at 346–47 (remarks of William Johnson); 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 99–100, 141–56 (1958). But see THE FEDERALIST No. 39 (J. Madison) (suggesting divisibility of sovereignty); 4 J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 61, 293–94, 390–95, 419–20 (Philadelphia 1865) (similar). See generally G. WOOD, *supra* note 20 (discussing American ideas about sovereignty between 1776 and 1787).

41. Construed most broadly, such an inalienable right squared perfectly with the orthodox notion that the sovereign, as the source of all law, was necessarily above the law, and could not be bound by law absent ongoing consent. Locke himself, it seems, did not carry his principles to this apparently logical conclusion. Although sovereignty originally resided with the People, Locke suggested that they had to "give [it] up" to government so that day-to-day order could be maintained. The People could only *reclaim* their surrendered sovereignty—by revolution—if government breached faith with the People by "act[ing] contrary to their trust." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 221, 243 (T. Peardon ed. 1952). In sharp contrast, the Americans came to believe that the People never parted with their ultimate sovereignty. Rather, they delegated certain sovereign powers to various governmental agents, but could revoke those delegations, and reclaim those powers, at any time and for any reason. See, e.g., THE FEDERALIST No. 84, at 512–13 (A. Hamilton); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819); J. DAVIS, *supra* note 40, at 141.

The violent nature of revolution, it appears, induced Locke to limit strictly the legitimate occasions for the exercise of the People's right to revolt. Americans domesticated and defused violent revolution by channelling it into (relatively) peaceful conventions. See *infra* text accompanying notes 146–50. As a result, Americans could expand the People's right to "revolt"—to alter or abolish their government—into a right that could be invoked (by convention) on any occasion at the pleasure of the People.

42. See G. WOOD, *supra* note 20, at 344–54; *supra* text accompanying notes 26–28.

an analytic wedge between the government and its People, relocating sovereignty from the former to the latter. Government officials were "representatives," "agents," "delegates," "deputies," and "servants" of the People—but they were not the People themselves, virtually or otherwise. Therefore, government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People. By thus relocating true sovereignty in the People themselves—"that pure, original fountain of all legitimate authority"<sup>43</sup>—Americans domesticated government power and decisively repudiated British notions of "sovereign" governmental omnipotence.<sup>44</sup>

The relocation of sovereignty from governments to the People raised three knotty and related questions. First, how could the People truly be sovereign given their obvious inability to collectively govern day-to-day affairs? Second, how could governments that lacked ultimate sovereignty legitimately command obedience? Finally, was not the creation of "limited" government a nonsensical attempt to divide necessarily indivisible sovereignty, thereby producing the solecism of *imperium in imperio*? Once again, agency principles furnished Americans with the critical tools of analysis. As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. Within the sphere of these delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their agency. So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty.<sup>45</sup>

This change in thinking did not occur overnight. Considerable noise, literally and figuratively, punctuated the great constitutional debates be-

43. THE FEDERALIST No. 22, at 152 (A. Hamilton); see also *id.* No. 49, at 313 (J. Madison) ("the people are the only legitimate fountain of power").

44. In the passionate words of James Wilson:

Even in almost every nation, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: Hence the haughty notions of state independence, state sovereignty and state supremacy. . . . [A]s described by Sir William Blackstone and his followers. . . . the British is a despotic government. It is a Government without a people. In that government, as so described, the sovereignty is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested. . . . The King and these three estates together form the great corporation or body politic of the Kingdom. . . . What, then, or where, are the People? Nothing! No where! . . . From legal contemplation they totally disappear!

*Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 461-62 (opinion of Wilson, J.) (emphasis altered); see also J.Q. Adams, Oration on the 4th of July, 1831, quoted in 1 J. STORY, *supra* note 21, § 209 n.1 ("It is not true, that there must reside in all governments an absolute, uncontrollable, irresistible, and despotic power; nor is such power in any manner essential to sovereignty. . . . The pretence of . . . [such power] existing in every government somewhere, is incompatible with the first principles of natural right.").

45. See *supra* note 41.

tween 1763 and 1789. Old words took on new meanings, as patriots struggled to build an intellectual framework that would order their thinking, affirm their deepest values, and make sense of the ideological spinning—the ideological revolution<sup>46</sup>—around them. Some, like James Wilson who “[m]ore boldly and fully than anyone else . . . developed the argument that would eventually become the basis of all Federalist thinking”<sup>47</sup> about sovereignty, evolved a careful and precise vocabulary in which government only had “power” but never “sovereignty.”<sup>48</sup> Others, like Alexander Hamilton, James Madison, John Marshall, and James Iredell, used different words to the same effect. When they spoke of government as sovereign they meant sovereign in a necessarily limited sense. By definition, government’s sovereignty was bounded; government was sovereign within its sphere of delegated power, and powerless beyond.<sup>49</sup>

### b. *The State Constitution Experience*

After declaring independence in 1776, each individual colony faced the immediate challenge of forging a new constitutional regime to fill the legal void created by separation from Britain. Unevenly and tentatively at first, but with increasing confidence and clarity, Americans began to put ideas of popular sovereignty into practice by giving concrete legal meaning and institutional substance to the emerging theoretical distinction between the People and their representatives. North Carolina’s new constitution, adopted in late 1776, began with a bold declaration of rights limiting the power of state officials. The declaration’s opening words are noteworthy yet unsurprising: “[A]ll political power is vested in and derived from the people only.”<sup>50</sup> A decade later, only a year before the North Carolina Supreme Court definitively construed the document to provide for judicial

46. Cf. G. WILLS, *INVENTING AMERICA* 51–53 (1979) (discussing etymological roots and eighteenth-century usage of word “revolution”).

47. G. WOOD, *supra* note 20, at 530.

48. See R. Ross, *The Federalists and the Problem of Sovereignty* (1984) (unpublished manuscript on file with author).

49. See, e.g., *THE FEDERALIST* No. 32, at 198 (A. Hamilton); *id.* No. 43, at 279 (J. Madison); *id.* No. 62, at 378 (J. Madison); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401, 404–10, 429–30 (1819) (Marshall, C.J.); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435–50 (1793) (opinion of Iredell, J.); Marshall, *A Friend of the Constitution*, in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 195 (G. Gunther ed. 1969). Given the Federalists’ obvious redefinition of the term, their language of governmental “sovereignty” seems wholly innocuous. A century later, however, the Supreme Court began to inject lethal ammunition into this previously unloaded gun by ignoring or misunderstanding the Federalists’ redefinition. See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890) (discussed *infra* text accompanying notes 207–08); cf. J. DAVIS, *supra* note 40, at 99, 142 (decrying “loose expressions” concerning government “sovereignty”).

50. N.C. CONST. of 1776, in 5 F. THORPE, *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS*: 1492–1908, at 2787 (1909). Note how the assertion that political power continues to be vested in, and not just derived from, the People goes beyond the Lockean formulation. See *supra* note 41.

review of state legislation, James Iredell underscored his state's rejection of the British parliamentary model:

It was, of course, to be considered how to impose restrictions on the legislature . . . [to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British parliament, but had severely smarted under its effects. We . . . should have been guilty of . . . the grossest folly, if in the same moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves.<sup>51</sup>

Iredell elaborated this theme in a later speech: "Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; and the people, without their consent, may new-model their government whenever they think proper . . . ."<sup>52</sup>

In Massachusetts, the ratification process itself dramatized the new American understanding of popular sovereignty. The proposed state constitution of 1778 went down to defeat in a popular referendum in part because of the symbolic point that it had been framed by the legislature—the government—and not by a specially elected constitutional convention of the People themselves.<sup>53</sup> Two years later, a new draft constitution emerged from a special convention and won popular approval. Equally dramatic was the constitution's language: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive or judicial, are their . . . agents, and are at all times accountable to them."<sup>54</sup>

Similar dramas were played out in other states as the former colonists framed new constitutions during the decade after the Declaration.<sup>55</sup> The

51. R. BERGER, *supra* note 38, at 35 (quoting 1786 address by Iredell on formation of North Carolina constitution).

52. 4 J. ELLIOT, *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 9 (1888).

53. E. MORGAN, *THE BIRTH OF THE REPUBLIC* 89-90 (1977); *see infra* text accompanying notes 146-50.

54. MASS. CONST. of 1780, in 3 F. THORPE, *supra* note 50, at 1890; *cf.* PA. CONST. of 1776, Declaration of Rights art. IV, in CONVENTIONS OF PENNSYLVANIA 55 (Harrisburg 1825) ("That all power being originally inherent in, and consequently derived from the people; therefore all officers of government . . . are their trustees and servants, and at all times accountable to them."); MD. CONST. of 1776, Declaration of Rights art. II, in 3 F. THORPE, *supra*, at 1686 (similar).

55. The experience in New Hampshire is particularly noteworthy. *See* G. WOOD, *supra* note 20, at 341-42. Consider also Madison's remarks regarding the key distinction between a state's People

details vary from state to state, but it is enough to note here that various local dress rehearsals (for so they appear in retrospect) set the stage for the great act of popular sovereignty that was the framing and ratification of the Federalist Constitution.

## B. *The Federalist Constitution*

The constitutional Convention of 1787 drew delegates from twelve states to Philadelphia to ponder anew the fate of the continent. Four main tasks faced the men who met there: creating a strong but limited central government, protecting individual rights against the states, dividing power within the central government, and dividing power between local and central officials. To perform each of these tasks, the Federalists leaned upon their new understanding of the sovereignty of the People. Indeed, this single idea informs every article of the Federalist Constitution, from the Preamble to Article VII.<sup>56</sup> It was thus no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." James Wilson, who as a member of the Philadelphia Committee of Detail himself penned what became the Constitution's famous first three words, later explained:

To the Constitution of the *United States*, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United Staes [sic]. . . .<sup>57</sup>

### 1. *Creating Central Authority*

The Federalists' first job was to build a new central government that would be strong yet bounded. Under the discarded British understanding, the task seemed impossible by definition. If the national government were sovereign, how could its powers be limited? If not, how could it enjoy any

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and its government: "[The novelty of] American governments lies in the total exclusion of the people in their collective capacity, from any share in [government]," in favor of exclusive reliance on "the principle of representation." *THE FEDERALIST* No. 63, at 387.

56. See *infra* text accompanying notes 126-70.

57. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (emphasis omitted). Although his name has unfortunately faded from American constitutional folklore, Wilson's role as a chief architect of the Constitution has long been recognized by historians. See, e.g., M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913) ("Second to Madison and almost on a par with him was James Wilson.").

legitimate authority to enforce its will? The Federalists dissolved the dilemma by crafting the Constitution as a set of broad yet bounded delegations of sovereign power from the sovereign People to various agents who would constitute the new central government. The limitations on that new government took the form of both express prohibitions—as in Article I, section 9 and the later Bill of Rights—and finite delegations. By carefully enumerating the powers granted, the framers made clear that the new government would enjoy no other general “sovereign” powers. Under the well-established rule of construction, *expressio unius est exclusio alterius*, the People retained all powers not expressly or impliedly delegated by enumeration—powers they could either give to other government agents in individual states, or withhold from all governments.<sup>58</sup> This structural canon of retained nondelegated powers was later made explicit by the text of the Tenth Amendment.

## 2. Limiting State Governments

The Federalists also worked to forge a strong set of federally enforceable individual rights against states—in Madison’s words, to correct “the abuses committed within the individual states . . . by interested or misguided majorities.”<sup>59</sup> The “multiplicity,” “mutability,” and “injustice” of extant state laws constituted a “dreadful class of evils” requiring a federal “remedy.”<sup>60</sup> Indeed, Madison wrote Thomas Jefferson that “the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the Public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.”<sup>61</sup>

58. See THE FEDERALIST No. 41, at 262–63 (J. Madison); *id.* No. 84, at 510–15 (A. Hamilton).

59. These abuses “were among the prominent causes of its [i.e., the Constitution’s] adoption, and particularly led to the provision contained in it which prohibits paper emissions and the violations of contracts, and which gives an appellate supremacy to the judicial department of the U.S.” 4 M. Farrand, *supra* note 40, at 86–87 (letter from James Madison to unknown party). At the Convention, Madison declared that the federal Constitution should “secure a good internal legislation & administration to the particular States[.] In developing the evils which vitiate the political system of the U.S. it is proper to take into view those which prevail within the States individually as well as those which affect them collectively . . .” 1 *id.* at 318; see also *id.* at 316 (remarks of J. Madison) (similar); 2 *id.* at 26, 110 (remarks of Gouverneur Morris and Madison) (similar); J. MADISON, *Vices of the Political System*, in 2 THE WRITINGS OF JAMES MADISON 361, 365–69 (G. Hunt ed. 1901) (similar).

60. 1 M. Farrand, *supra* note 40, at 318–19 (remarks of J. Madison). Challenging William Paterson’s “New Jersey Plan” to prop up the existing Articles of Confederation instead of redesigning government from the ground up, Madison argued that “[t]he rights of individuals are infringed by many of the state laws—such as issuing paper money, and instituting a mode to discharge debts differing from the form of the contract. Has the Jersey plan any checks to prevent the mischief? Does it in any instance secure internal tranquility?” *Id.* at 327.

61. 5 THE WRITINGS OF JAMES MADISON, *supra* note 59, at 27 (letter to T. Jefferson); see also 1 M. Farrand, *supra* note 40, at 134 (remarks of Madison to Roger Sherman) (similar). For further discussion of these and similar statements, see Amar, *supra* note 9, at 247 n.134 and sources cited.



Once again, the sovereignty of the People lay at the heart of the Federalist solution. By ratifying the new Constitution, the People themselves could impose limitations on powers previously exercised by state governments. To deny this would be to deny the right of the principal to modify or revoke a power previously delegated to an agent, and to interfere with the sovereign right of the People to "alter or abolish" their governments at any time. But only direct ratification by the People in convention,<sup>62</sup> as proposed by the new Constitution, could securely limit state governments. The Articles of Confederation had not attempted to impose "internal" limitations on the power of each state government towards its own citizens—that was one of the document's chief flaws, in Federalist eyes<sup>63</sup>—but any effort to impose such restrictions might well have been illusory. Having been ratified only by state legislatures, how could the Articles have imposed any binding restrictions on those bodies in favor of individual rights? What a majority in one state legislature had done by ratification, a subsequent legislature could arguably undo by a similar majority. Only a document emanating from a higher source than a state legislature itself could undeniably bind that body.<sup>64</sup>

Although the Constitution's most sweeping assertions of federal power on behalf of individual rights lay three-quarters of a century and a Civil War away, the Federalists at Philadelphia succeeded in imposing significant federal restrictions on state power. Federal courts would prevent states from passing bills of attainder or ex post facto laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contract; Congress would guarantee citizens of each state a republican state government by refusing to seat representatives from anti-republican regimes, and by helping to put down attempted insurrections and coups; and the President would retain ultimate command of state militias when they were called into national service.

### 3. *Dividing Power Horizontally: Bicameralism and Separation of Powers*

The third job confronting the framers was to allocate authority within the new central government. Once again, the Federalists consciously broke

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therein; Huntington, *The Founding Fathers and the Division of Powers*, in *AREA AND POWER* 191–92 (P. Maas ed. 1959).

62. See *infra* text accompanying notes 146–50.

63. See *supra* notes 59–61.

64. See *THE FEDERALIST* No. 22, at 152 (A. Hamilton); *id.* No. 43, at 279–80 (J. Madison); *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 404 (1819); 2 M. Farrand, *supra* note 40, at 88 (remarks of George Mason).

with British Blackstonian orthodoxy. Far from seeking to create an indivisible central organ to wield all national power, the Federalists labored to divide power among distinct agencies. To them, "[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>65</sup>

They viewed the Congress created under the Articles of Confederation as dangerous precisely because it was a single body invested with all powers conferred by that instrument. The only thing saving such a wretched system, they argued, was the skimpiness of the national powers delegated. The unicameral assembly created by the Articles lacked power to regulate commerce; to levy duties; to legislate directly upon, and directly tax, individuals; to nullify unjust internal state laws; to enact laws incidental to, or implied by, express enumerations; to nationalize state militias; to directly raise an army and navy; to appoint all military officers; to suppress internal insurrections, coups, and anti-republican governments; to directly execute its own enactments; to set up a general system of national courts; and to insist on observance of the Articles and its own enactments thereunder as supreme law overriding even state constitutions. Because the Federalists proposed to add all of these grand powers, and more, to the central government, they needed to effect a radical redesign of its internal architecture.<sup>66</sup> The evil to be avoided was plain enough: an indivisible national assembly that might view itself as the virtual embodiment of the People, unlimited in its powers—in short, Blackstone's Parliament:

The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter . . . .<sup>67</sup>

The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.

. . . . [I]t is against the enterprising ambition of this department

65. THE FEDERALIST No. 47, at 301 (J. Madison); see also *id.* No. 48, at 311 (J. Madison) ("It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for. . . .") (quoting T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (London 1787)).

66. See THE FEDERALIST No. 22, at 151-52 (A. Hamilton); *id.* No. 84, at 517-18 (A. Hamilton); *id.* No. 38 (J. Madison); see also 2 M. Farrand, *supra* note 40, at 666-67 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution); 1 *id.* at 34, 256, 287, 339 (remarks of Pierce Butler, Edmund Randolph, Alexander Hamilton, and George Mason).

67. THE FEDERALIST No. 71, at 433 (A. Hamilton).

that the people ought to indulge all their jealousy and exhaust all their precautions.<sup>68</sup>

The Federalists' strategy for avoiding legislative tyranny was twofold. First, divide the legislature itself into two separate houses chosen in different ways and holding different terms of office. Each house would have strong institutional incentives to deny any grandiose claim made by the other that it alone was the true embodiment of the People.<sup>69</sup> Second, diffuse power further by creating independent national executive and judicial branches. Under the Articles, central executive and judicial officers were pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power. In sharp contrast, the Federalist Constitution mandated the existence of a national executive and judiciary; rigidly fixed the tenure of the President and federal judges (qualified only by the possibility of removal upon impeachment and conviction for grave misconduct); guaranteed those officers' salaries; and vested them with large portions of power beyond legislative control.<sup>70</sup> Although their methods of selection and tenures of office varied, all national officials ultimately derived their authority from the People. The President and federal judges were as much agents of the People as the legislators were; each branch—each agency—was equal and co-ordinate.<sup>71</sup> And each agency would have incentives to win the trust and affection of the principal (the People) by exposing and resisting ultra vires acts of less faithful agencies. Lest management come to act as if it owned the corporation, the shareholders of America<sup>72</sup> created several sets of managers to keep an eye on each other as they minded the national store.<sup>73</sup> The classic formulation of the point is Madison's *The Federalist* No. 51:

68. *Id.* No. 48, at 309 (J. Madison).

69. See THE FEDERALIST No. 51 (J. Madison); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1025-31 (1984); cf. G. WILLS, *supra* note 22, at 117-25 (emphasizing importance of legislative bicameralism in Madisonian theory).

70. See Amar, *supra* note 9, at 231-33, 246-54.

71. See G. WOOD, *supra* note 20, at 446-53, 547-62, 596-600; Ackerman, *supra* note 69, at 1025-31; Amar, *supra* note 9, at 231-33. Of course, Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act. Textually, the "necessary and proper" clause vests Congress with significant control over powers vested "in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, para. 18 (emphasis added); see Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102. And historically, the Federalists expected Congress to be the most powerful—and thus most dangerous—branch. See, e.g., THE FEDERALIST No. 51, at 322 (J. Madison) ("In republican government, the legislative authority necessarily predominates.").

72. See *supra* text accompanying note 36.

73. The relocation of sovereignty outside of government, combined with the application of agency law principles, created virtually infinite possibilities for governmental organization by defusing the

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . .

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. . . . [T]he private interest of every individual may be a sentinel over the public rights.<sup>74</sup>

The parallels between Madison's model of political competition and Adam Smith's (then new) model of economic competition are both self-conscious<sup>75</sup>—witness Madison's reference to “private as well as public” incentive systems—and powerful. Both models rely on overarching incentive structures to harness individual self-interest (whether ambition or avarice) in a way that promotes some larger public good (whether “public rights” or national wealth). Both models depend on competition to further liberty and forestall undesirable concentrations of power (whether tyranny or monopoly).

#### 4. *Dividing Power Vertically: Federalism*

Finally, the Federalists faced the problem of allocating power vertically between central and local officials—the problem of federalism. The issue was notoriously difficult. In the mid-1770's, it had cracked open the British Empire. A decade later, and for different reasons, it was threatening to dissolve the existing confederacy of states. Yet again, the emerging Federalist principles of popular sovereignty and agency theory allowed a new constitutional solution.

##### a. *Federalism and the Empire*

Until quite late in the revolutionary debate, the colonists had been willing to concede, as a practical matter, parliamentary authority to regulate a small but important set of matters of truly imperial scope, such as foreign affairs and trade among different parts of the Empire. After all, someone had to have power to make these trans-colonial decisions if the Empire were to remain a viable entity, and Parliament seemed as good a choice as

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objection that separate governmental entities would result in a theoretically unacceptable *imperium in imperio*.

74. THE FEDERALIST No. 51, at 321–22 (J. Madison); accord 1 M. Farrand, *supra* note 40, at 421–22 (remarks of Madison).

75. Garry Wills makes a persuasive case for his thesis that Scottish enlightenment thought powerfully influenced the thinking of Madison and Hamilton. G. WILLS, *supra* note 22; accord D. ADAIR, *FAME AND THE FOUNDING FATHERS* (1974).

any. Yet the colonists categorically denied that an unrepresentative central assembly sitting months away in England should also have plenary control over truly internal affairs of colonial government like everyday taxation and legislation. Such domestic affairs should be exclusively regulated by local bodies. In short, the colonists were willing to refine and codify the rough *de facto* allocation of decisionmaking responsibility that had prevailed in the colonies before 1763.<sup>76</sup>

The British found the Americans' first proposals to constitutionalize federalism—for so we should view them with hindsight—theoretically incoherent. Perhaps a working balance between central and local authority had been achieved during the colonies' first century and a half, but local autonomy was purely a matter of parliamentary grace, not constitutional right.<sup>77</sup> Either Parliament or each colonial assembly was sovereign. If the former, Parliament enjoyed all power over all affairs, no matter how "internal." If the latter, then Parliament had no authority whatsoever, even to regulate imperial affairs, and a raw state of nature existed between Great Britain and America. The colonists' proposed constitutional division of authority was a nonsensical *imperium in imperio*; like sovereignty, the Empire was legally an all or nothing concept. Take it or leave it.<sup>78</sup>

Faced with this choice, the colonists left it.<sup>79</sup> Yet there remained the problem of weaving a new cloak of federalism to replace the imperial one cast off.

76. See Declaration and Resolves of the First Continental Congress (1774), reprinted in *DOCUMENTS OF AMERICAN HISTORY* 82 (H. Commager 9th ed. 1973).

77. Hence the Declaratory Act accompanying parliamentary repeal of the Stamp Act. See *supra* note 30. Note again the problem of adverse possession/abandonment-by-nonuser posed in a system not governed by a written constitution. See *supra* note 21.

78. See B. BAILYN, *supra* note 20, at 198–229; A. McLAUGHLIN, *supra* note 25, at 129–56; McLaughlin, *The Background of American Federalism*, 12 *AM. POL. SCI. REV.* 215 (1918).

79. Consider the prescient words of Edmund Burke counselling against Parliament's pedantic insistence on its theoretical omnipotence, given its willingness to continue to allow real local autonomy in practice:

If, intemperately, unwisely, fatally, you sophisticate and poison the very source of government by urging subtle deductions and consequences odious to those you govern from the unlimited and illimitable nature of sovereignty, you will teach them by those means to call that sovereignty itself in question. When you drive him hard the boar will turn upon the hunters. If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face, nobody will be argued into slavery.

E. Burke, Speech on American Taxation, quoted in McLaughlin, *supra* note 78, at 231 n.25. That a practical accommodation might have been worked out between Britain and America, but for the theoretical sticking point of sovereignty, once again demonstrates the intellectual and ideological—indeed hyperlegal—dimensions of the dispute. See B. BAILYN, *supra* note 20, at 198–229; A. McLAUGHLIN, *supra* note 25, at 129–56; McLaughlin, *supra*, at 230–31. For more discussion of the Revolution as a legal dispute, see Black, *The Constitution of Empire: The Case for the Colonists*, 124 *U. PENN. L. REV.* 1157 (1976); Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 *S. ATLANTIC Q.* 56 (1986).

### b. *Federalism and the Confederation*

In relocating sovereignty from the government to the People, the revolutionary generation initially seemed to have in mind the People of each state, and not the People of the United States as a whole. The colonies united to declare their independence, but their Declaration proclaimed them to be "free and independent states"<sup>80</sup>—independent even of each other, save as they chose to concert their action.<sup>81</sup> In short, they were united states, not a unitary state; they were thirteen Peoples, not (yet) one People. Thus the sovereignty of the People—a concept that the colonists had wielded so skillfully as various newly-independent states adopted their own internal constitutions—proved a blunt instrument when the revolutionary generation turned to matters of inter-state governance. Their first formal instrument—the Articles of Confederation—was therefore strikingly traditional.

Under traditional jurisprudence, sovereign states could enter into treaties with one another, and might even join together in a perpetual federation, or league, without losing their sovereign status.<sup>82</sup> Such a federation would in no sense be an internal government exercising sovereign coercive powers over individuals; rather, it was an association of states, a "society of societies,"<sup>83</sup> that could coordinate joint action by its "sovereign" members. This sort of federation by mutual treaty was exactly what the Revolutionaries had in mind when they created the Articles. The document was not styled as a "constitution" (as were the new charters within each state) but as a "confederacy," a "firm league of friendship" entered into by "different states," each of which would "retain[] its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."<sup>84</sup> The central organ created was not so much a national

80. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added).

81. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796); J. DAVIS, *supra* note 40, at 86, 118; I. M. Farrand, *supra* note 40, at 324, 340 (remarks of Luther Martin); J. TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* 2-3 (Washington City 1823); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1068 n.156 (1983); Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1906).

82. As the Swiss jurist Emmerich de Vattel put it: "The deliberations in common will offer no violence to the sovereignty of each member." E. VATTEL, *THE LAW OF NATIONS* bk. I, ch. I, § 10 (London 1760).

83. See C. MONTESQUIEU, *THE SPIRIT OF LAWS* (D. Carruthers ed. 1977); Diamond, *The Federalists' View of Federalism*, in *ESSAYS IN FEDERALISM* 21 (1961); Diamond, *The Federalist on Federalism: "Neither A National Nor a Federal Constitution, But A Composition of Both,"* 86 YALE L.J. 1273 (1977) [hereinafter *The Federalist on Federalism*].

84. Articles of Confederation, 1781, arts. I-III (emphasis added). Note also the description of a side deal between two or more states within the league as a "Treaty." In contrast, the Federalist Constitution refers to such an agreement as a "compact" in contradistinction to a state "Treaty, Alli-

"legislature" (that word appears only in the document's reference to individual state governments) as an international assembly of ambassadors. The very word chosen to describe the central assembly, "Congress," suggested its inter-sovereign character,<sup>85</sup> and so did its organizational structure. Each state legislature would appoint a "delegat[ion]" of between two and seven members, with each delegation to vote as a bloc casting one vote, regardless of its size or its state's population; delegations were to be paid by state governments which could alter salaries at will to keep delegates in line; state governments expressly retained the right to "recall" and replace their ambassadorial delegates "at any time"; and each delegate was guaranteed a sort of diplomatic immunity from state arrest and imprisonment.<sup>86</sup> Finally, to prevent delegates from developing unduly strong attachments to the union, each was to be elected annually, was forbidden to hold "any"<sup>87</sup> remunerative "office under the United States" (there was no similar proscription against holding other *state* offices), and was ineligible to serve in Congress for more than three out of any six consecutive years.

Although the Congress enjoyed some important powers on paper, it had no means of carrying them out or of compelling compliance. It could not directly tax or legislate upon individuals; it had no explicit "legislative" or "governmental" power to make binding "law" enforceable as such in state courts; it lacked authority to set up its own general courts; and it could raise troops and money only by "requisitioning" contributions from each state. On paper, such requisitions were "binding." In fact, they were mere requests. As one contemporary writer put it, Congress "may declare every thing, but do nothing."<sup>88</sup>

By the time of the Philadelphia Convention, the Confederation was in shambles. Various states refused to honor requisitions, flouted official judgments in the very limited category of controversies committed to central courts, enacted laws repudiating earlier treaties entered into by Con-

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ance, or Confederation" with outside nations. The former is approvable by Congress; the latter, absolutely prohibited. U.S. CONST. art. I, § 10.

85. Consider, for example, the "Congress" of Vienna or Edmund Burke's famous statement that Parliament was not "a *congress* of ambassadors." E. Burke, Speech to the Electors of Bristol, *quoted in* G. WOOD, *supra* note 20, at 175. By contrast, no state legislature in the 1770's and 1780's was labeled a "Congress" by its state constitution. *See infra* note 134.

86. In an anonymous essay defending *McCulloch v. Maryland*, John Marshall wrote that "[t]he confederation was, essentially, a league; and Congress was a corps of ambassadors, to be recalled at the will of their masters." Marshall, *supra* note 49, at 199. In an earlier essay, Marshall described members of Congress as "ministers plenipotentiary." Marshall, *A Friend to the Union*, in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, 78, 86 (G. Gunther ed. 1969); *see also* 1 M. Farrand, *supra* note 40, at 256 (remarks of Edmund Randolph) (labelling Congress under Articles "a mere diplomatic body").

87. Not "any other," suggesting that congressional delegates were *state* officers.

88. 1 J. STORY, *supra* note 21, § 246 (emphasis omitted) (quoting unidentified author).

gress, waged unauthorized local wars against Indian tribes, conducted negotiations with foreign nations independently of Congress, and maintained standing armies without congressional permission—all in clear contravention of the Articles.<sup>89</sup> In short, the “United States” in 1787 was not much more than the “United Nations” is in 1987: a mutual treaty conveniently dishonored on all sides. Indeed, it was precisely the Articles’ status as a fallen treaty that Madison seized on to justify the Philadelphia Convention’s bold declaration that its new Constitution would go into effect among any nine states that chose to ratify it—notwithstanding the Articles’ clear requirement that all amendments to it be unanimously adopted:

A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the *multiplied* and *important* infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.<sup>90</sup>

### c. *Federalism and the Constitution*

The Philadelphia delegates thus had the benefit of two previous efforts to achieve a theoretically acceptable and practically workable federalism. The imperial model had proved unacceptable because it centralized all power, denying individual state governments any role as independent centers of authority. In the language of the time, it was a pure “consolidation” that “melted down” all states into one monstrous “common mass.”<sup>91</sup> It was too “national.” The Articles of Confederation, on the other hand, had failed because there was insufficient gravitational pull from the center

89. See J. MADISON, *supra* note 59.

90. THE FEDERALIST NO. 43, at 279–80 (J. Madison). For additional statements of Madison and others to similar effect, see 1 M. Farrand, *supra* note 40, at 122–23, 314–17, 485; 2 *id.* at 93 (remarks of Madison); J. MADISON, *supra* note 59, at 365; 4 J. ELLIOT, *supra* note 52, at 308 (remarks of Charles Cotesworth Pinckney at South Carolina ratifying convention); *id.* at 230 (remarks of James Iredell at North Carolina ratifying convention).

91. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819); G. WILLS, *supra* note 22, at 169–75; G. WOOD, *supra* note 20, at 524–32 (“Consolidation or Confederation”).



to counter the centrifugal tendencies of each state. The system was too "federal."<sup>92</sup> What America needed, then, was some third model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body.<sup>93</sup> It was exactly such a system—"in strictness, neither a national nor a federal Constitution, but a composition of both"<sup>94</sup>—that the Federalists conceived in Philadelphia.

Once again, the heart of the issue was sovereignty. The Articles had crumbled because they had been erected on the uneven and shifting foundation of the sovereignty of the People in each state. The imperial model had failed because it asserted the omnipotent sovereignty of the central assembly, Parliament. Yet to state the matter this way was to glimpse a third and more promising alternative: Sovereignty must be vested in the People of the United States as a whole. Such a system could shore up the inherent instability of the Articles of Confederation. It could also avoid the monumental centralism of the imperial model by relocating sovereignty from the national assembly to the People of the nation. The People could limit the delegated authority of the national government and stipulate that certain powers be reserved for the government of each state.

Agency theory helped the Federalists conceptualize such a system in legal terms. Consider, for example, Madison's *The Federalist* No. 46:

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other.

92. The etymology of the word "federal" is noteworthy: Based on the Latin *foedus* (meaning treaty or covenant), and its cognate *fides* (faith), a federal union is one relying on good faith and voluntary compliance of member states, instead of direct governmental coercion of individuals. See *The Federalist on Federalism*, *supra* note 83, at 1279–80. In this light, Article XIII of the Articles of Confederation strongly confirms the document's purely federal nature: "we . . . solemnly plight and engage the faith of our respective constituents." (emphasis added). Cf. *THE FEDERALIST* No. 33, at 204 (A. Hamilton) (distinguishing between "a mere treaty, dependent on the good faith of the parties" and a "government, which is only another word for POLITICAL POWER AND SUPREMACY"); 1 M. Farrand, *supra* note 40, at 34 (remarks of Gouverneur Morris) (similar).

93. For examples of exactly this sort of Newtonian imagery, see *THE FEDERALIST* No. 9, at 73 (A. Hamilton); *id.* No. 15, at 111 (A. Hamilton); 1 M. Farrand, *supra* note 40, at 153, 165, 276 (remarks of John Dickenson, James Wilson, James Madison, and William Paterson). For a fascinating discussion of the effect of Enlightenment thought on the patriot generation, see G. WILLS, *supra* note 22; G. WILLS, *supra* note 46.

94. *THE FEDERALIST* No. 39, at 246 (J. Madison).

These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .<sup>95</sup>

As with separation of powers, federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds.

It is tempting here simply to invoke the Constitution's famous first seven words—"We the People of the United States"—and be done with it. For at first blush, they seem to furnish irrebuttable proof that the sovereignty of one united People, instead of thirteen distinct Peoples, provided the new foundation of the Federalist Constitution. The temptation is all the greater because of the (quite literal) primacy of these words in the text itself, their centrality in the minds of both pro- and anti-ratification leaders in the various state conventions,<sup>96</sup> and their prominence in the early landmark opinions of the Supreme Court.<sup>97</sup> Yet while the best reading of the Constitution supports the unitary People thesis,<sup>98</sup> we must resist the temptation to place exclusive reliance on the Preamble's opening phrase. Any argument based solely on these words proves too much. The Declaration of Independence was made "in the Name, and by the Authority of *the* good People [not Peoples] of these colonies," and the Articles of Confederation spoke of "*the* people [again singular] of the different states in the

95. *Id.* No. 46, at 294 (J. Madison). Note also the words of Wilson: "When the principle is once settled that *the people* are the source of authority, the consequence is, that they . . . can distribute one portion of power to the more contracted circle, called state governments; they can furnish another portion of power to the government of the United States." 2 J. ELLIOT, *supra* note 52, at 444 (remarks at Pennsylvania ratifying convention).

96. Compare 2 J. ELLIOT, *supra* note 52, at 497-99 (remarks of James Wilson at Pennsylvania ratifying convention) ("This . . . is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, '*We, the people, do ordain and establish,*' &c. . . . [T]he system itself tells you what it is; it is an ordinance and establishment of the people.") with 2 *id.* at 134 (remarks of Anti-Federalist Samuel Nasson at Massachusetts ratifying convention) (if Constitution's opening phrase "does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does") and 3 *id.* at 44 (remarks of Anti-Federalist Patrick Henry at Virginia ratifying convention) ("The fate . . . of America may depend on this. . . . Have they made a proposal of a compact between the states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government. The question turns, sir, on that poor little thing—the expression, *We, the people*, instead of the *states*, of America."); and A. MASON, *THE STATES RIGHTS DEBATE* 135 (2d ed. 1972) (quoting remarks of Anti-Federalist Robert Whitehill at Pennsylvania ratifying convention) ("'*We the people of the United States,*' is a sentence that evidently shows the old foundation of the union is destroyed, the principle of confederation excluded, and a new and unwieldy system of consolidated empire is set up, upon the ruins of the present compact between the states."); see also G. WOOD, *supra* note 20, at 524-32 ("Consolidation or Confederation").

97. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819) (Marshall, C.J.); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816) (Story, J.); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454, 463 (1793) (opinion of Wilson, J.); *id.* at 471 (opinion of Jay, C.J.).

98. See *infra* text accompanying notes 126-70.

union."<sup>99</sup> Yet, as we have seen, neither of these documents, taken as a whole, is best understood as proclaiming that Americans were one sovereign People.<sup>100</sup> Nor is the question of *which* People were sovereign a purely pedantic one whose nuances we need not ponder. On this question hinges nothing less than a proper understanding of the most momentous issues in the subsequent history of American federalism—issues framed by the great antebellum debate between states' rightists and nationalists.

### C. *The Civil War Debate*

The ratification of the Federalist Constitution both reflected and reinforced the emerging American consensus that the People were sovereign and that governments were therefore necessarily limited.<sup>101</sup> On this point, men who agreed on little else—Thomas Jefferson and Alexander Hamilton,<sup>102</sup> Spencer Roane and John Marshall,<sup>103</sup> John C. Calhoun and Joseph Story<sup>104</sup>—spoke with one voice. Yet if, to quote Jefferson's first in-

99. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added); Articles of Confederation, 1781, art. IV (emphasis added).

100. Indeed, as late as 1787, Marylanders still called their state "the nation." G. WOOD, *supra* note 20, at 356. See generally J. DAVIS, *supra* note 40, at 82–120 (presenting states' rights interpretation of Declaration and Articles).

101. This consensus existed, of course, among a very limited set of prominent white male property owners. Yet the idea of popular sovereignty could serve as a benchmark to measure the obvious deficiencies in America's system of political participation, and as a pole star to guide democratic progress. See *infra* text accompanying notes 164–70.

102. Compare T. JEFFERSON, *Notes on The State of Virginia*, in THE PORTABLE THOMAS JEFFERSON 23, 170, 176 (M. Peterson ed. 1975) ("[T]o render a form of government unalterable by ordinary acts of assembly, the people must . . . [choose] special conventions to form and fix their government . . . [and] to bind up the several branches of government by certain laws, which when they transgress their acts shall become nullities . . .") with THE FEDERALIST No. 22, at 152 (A. Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.").

103. Compare Roane, *Hampden*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 142–43 (G. Gunther ed. 1969) ("The old confederation, I admit, was adopted by the legislatures of the several states: but the validity of that adoption may well be questioned. That adoption took place, in the infancy of our republic, and when we had not emancipated ourselves from the opinion, which still prevails in Europe, that the sovereignty of states abides in their kings, or governments. That is, in this country, and at this day, an outrageous heresy. None but the people of a state, in exclusion of its government, are competent to make or reform a government of whatever nature. The governments are their deputies, for limited and defined objects.") with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (Marshall, C.J.) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers . . . [and may] establish certain limits not to be transcended by those departments.").

104. Compare J. CALHOUN, *Letter to General Hamilton on the Subject of State Interposition*, in 6 WORKS OF JOHN C. CALHOUN 144, 151 (New York 1855) ("sovereignty resides elsewhere—in the people, not in the government") with 3 J. STORY, *supra* note 21, § 1609 ("No man in a republican government can doubt, that the will of the people is, and ought to be, supreme. . . . The constitution is the will, the deliberate will, of the people.").

augural address, Americans were "all republicans . . . all federalists"<sup>105</sup> on the issue of the sovereignty of the People, the two parties had very different "Peoples" in mind.<sup>106</sup>

To states' rightists (the Anti-Federalists and Republicans of the early antebellum period, the Confederates of the 1860's), the People of each state were sovereign. Each People had their own unique set of government agents (state government) and a set of agents in common with the Peoples of other states (the federal government).<sup>107</sup> The Constitution was a purely federal compact among thirteen sovereign principals to coordinate certain joint activities by employing a common agency. To these states' rightists, the Constitution marked no sharp break with the sovereignty structure of the Articles of Confederation.<sup>108</sup> At most the Constitution simply made clear that sovereignty did not reside in state legislatures, as the Articles could have been (mis)interpreted as implying, but in state Peoples.<sup>109</sup>

To nationalists (the Federalists of the early antebellum era, the Unionists of the 1860's), the People of the United States as a whole were sovereign. The People had a unique set of national agents representing the whole (the federal government) and various sets of local agents representing parts of the whole (state governments).<sup>110</sup> The Constitution was not an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature—the People of the nation.<sup>111</sup> These nationalists either argued that the Constitution sharply broke with the pre-existing structure of sovereignty,<sup>112</sup> or claimed that ever since the Declaration of Independence, Americans had been one People notwithstanding a purely formal reading of the text of the Articles of Confederation.<sup>113</sup>

105. T. JEFFERSON, *First Inaugural Address*, in T. JEFFERSON, *supra* note 102, at 292.

106. The work of my colleague Jeff Powell contains excellent insights into this debate. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) [hereinafter Powell, *Original Intent*]; Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985) [hereinafter *Story's Commentaries*].

107. See, e.g., *Amphictyon*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52, 56 (G. Gunther ed. 1969); J. CALHOUN, *supra* note 104, at 151–52.

108. See, e.g., J. CALHOUN, *supra* note 104, at 158; J. DAVIS, *supra* note 40, at 154–56.

109. See, e.g., Roane, *supra* note 103.

110. The language of "whole" and "parts" is, of course, a hallmark of Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 435–46 (1819); see also Washington, *Farewell Address*, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 213, 215–17 (J. Richardson ed. 1898) (similar); A. LINCOLN, *Message to Congress in Special Session*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 435 (R. Basler ed. 1953) (similar).

111. See *Original Intent*, *supra* note 106, at 904–05, 915–17, 922–24; *Story's Commentaries*, *supra* note 106, at 1302–06.

112. This, I believe, was John Marshall's view. See *infra* text accompanying note 155.

113. Professor Powell sees Justice Story's *Commentaries* as the classic exposition of this view. *Story's Commentaries*, *supra* note 106, at 1303–04. Shades of it may also be found in Chief Justice Jay's opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470–71 (1793).

James Madison attempted to straddle the states' rightist-nationalist debate by suggesting that ultimate sovereignty had somehow been divided between the People of each state and the People of America as a whole. See *supra* note 40. On this point, the father of the Constitution was uncharacter-

Nationalists and states' rightists could offer complementary—indeed, virtually identical—accounts of how the sovereignty of the People enabled the Constitution to empower yet limit federal officers, to impose restrictions on state governments, and to separate and divide power within the federal government. On such questions, it did not much matter which People were sovereign, but only that “the People” were and that governments were not. On issues of federalism, however, divergent understandings of sovereignty pointed the two parties in opposite directions.

On the level of day-to-day government, the two parties' visions yielded conflicting implications for the scope of federal legislative and judicial power. Consider first the scope of Congress' legislative powers under Article I—the first question of *McCulloch v. Maryland*.<sup>114</sup> If the Constitution was in fact a compact among thirteen sovereign Peoples, then arguably Article I should be strictly construed, in accordance with the traditional rule that treaties generally be interpreted narrowly. Indeed, this was exactly Jefferson's interpretive strategy in arguing against the constitutionality of the first national bank.<sup>115</sup> If, however, the Constitution was not a treaty among different Peoples but a grant of power by one People to a special set of national agents, then Hamilton's rejoinder to Jefferson gained weight:

This restrictive interpretation of [Article I] is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good.<sup>116</sup>

Consider next the scope of the Supreme Court's appellate jurisdiction over state courts—the issue in *Martin v. Hunter's Lessee*.<sup>117</sup> States' rightists found it hard to believe that the sovereign People of Virginia had delegated the last word on the meaning of the federal compact (at least as it applied to Virginia) to a federal judiciary beyond their exclusive control.<sup>118</sup> Nationalists, however, found it equally implausible that the sovereign People of America had intended to forbid agents of “the whole” to

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istically without followers. Almost every other major figure thought that ultimate sovereignty was indivisible and therefore had to reside solely in either a state or a continental People.

114. 17 U.S. (4 Wheat.) 316 (1819).

115. See T. JEFFERSON, *Opinion on the Constitutionality of a National Bank*, in 5 THE WRITINGS OF THOMAS JEFFERSON 284 (P. Ford ed. 1895); *Original Intent*, *supra* note 106, at 888, 931.

116. A. HAMILTON, *Opinion as to the Constitutionality of the Bank of the United States*, in 3 WORKS OF ALEXANDER HAMILTON 455 (H. Lodge ed. 1885); see *Original Intent*, *supra* note 106, at 913–17.

117. 14 U.S. (1 Wheat.) 304 (1816).

118. See, e.g., Roane, *supra* note 103, at 148–51.

review judicial decisions about the meaning of the Constitution rendered by agents of a local "part."<sup>119</sup>

Of course, as a logical matter, the question whether the People of the state or of the Union were sovereign did not necessarily dictate the allocation of power between state and federal government. Even if the Constitution was an inter-sovereign compact, it obviously contemplated an exceptionally tight federation whose nature and purposes might warrant deviation from the general rule that treaties be narrowly construed.<sup>120</sup> Similarly, there was nothing in the logic of sovereignty that would have prevented the People of Virginia from giving federal judicial agents the last word (vis-a-vis state agents) on constitutional meaning. Conversely, even under the nationalist premise of unitary sovereignty, the existence of local agents with general legislative and judicial jurisdiction might argue against an overly broad reading of the powers of central authorities. Nevertheless, the states' rights vision did at least support a rebuttable interpretive presumption favoring state legislatures over Congress, and state courts over the federal judiciary.

When we move from the allocation of power between state and federal agents to the allocation of power between federal agents and the People of a state themselves, in convention assembled,<sup>121</sup> an even starker contrast emerges. If the People of South Carolina were sovereign, they necessarily retained the inalienable right to judge for themselves whether the federal compact had been breached.<sup>122</sup> And if, *in convention*, the People of South Carolina determined that a material and substantial breach had occurred (regardless of what federal judges or Peoples in other states thought), was it not their sovereign right to withdraw—to secede—from the compact?<sup>123</sup> And did not this greater power of legitimate secession subsume the lesser of nonacquiescence in—nullification of—any particular action of federal agents deemed unconstitutional by the popular convention? If, on the

119. See, e.g., Marshall, *supra* note 49, at 200–14; D. WEBSTER, *The Constitution Is Not a Compact Between Sovereign States*, in 3 WORKS OF DANIEL WEBSTER 448, 479–86 (Boston 1851).

120. See Marshall, *supra* note 49, at 169–71.

121. See *infra* text accompanying notes 146–50.

122. See J. CALHOUN, *Address on the Relation Which the States and General Government Bear to Each Other*, in 6 J. CALHOUN, *supra* note 104, at 59, 75 (Fort Hill address).

123. See generally J. DAVIS, *supra* note 40 (using sovereignty theory to justify Confederate secession); A. STEPHENS, *supra* note 19 (same). Lincoln brilliantly described the "sophism" of secession as follows:

The sophism itself is, that any state of the Union may, consistently with the national Constitution, . . . withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be sole judge of its justice, is too thin to merit any notice. . . . This sophism derives much—perhaps the whole—of its currency, from the [false] assumption that there is some omnipotent, and sacred supremacy pertaining to . . . [the People of] each State of our Federal Union.

A. LINCOLN, *supra* note 110, at 433.

other hand, the People of America collectively were sovereign, then, in the words of the states' rightist John C. Calhoun, "there is an end of the argument. The claimed right for a State [People] of defending her reserved powers against the General Government, would be an absurdity."<sup>124</sup>

Thus the great constitutional issues of the antebellum era—congressional power and interposition, *McCulloch* and *Martin*, nullification and secession—all turned to some degree on *which* People were sovereign. And the first seven words of the Constitution only frame, but do not (without more) answer, the all-important question. Indeed, the Constitution's consistent use of the phrase "the United States" as a plural noun only serves to cast further doubt on the self-evident correctness of the conventional reading of the Preamble's opening phrase.<sup>125</sup> However, a closer look at the rest of the Constitution reveals several other provisions that can help the Preamble's overworked opening words bear the argumentative load.

### 1. *The Unitary People*

At the outset, let us look at the Preamble's *final* seven words. What is being ordained and established is a "Constitution for the United States of America." Not a "league," however "firm," not a "confederacy" or a "(con)federation," not a "compact" among states, but a *constitution* created by a single People for internal government, styled after earlier state prototypes.<sup>126</sup> In this light, Chief Justice Marshall's immortal words in *McCulloch* take on added meaning: "[I]t is *a constitution* we are expounding."<sup>127</sup>

We should also note the ways in which the Preamble subtly but suggestively altered the purposive language of the Articles. Under the earlier instrument, "the said states" had leagued together "for their common defense, the security of their Liberties, and their mutual and general welfare."<sup>128</sup> The Federalist Preamble speaks instead of providing for "the common defense," promoting "the general Welfare" (significantly, the word "mutual" is dropped), and securing "the Blessings of Liberty." And

124. J. CALHOUN, *supra* note 104, at 146.

125. U.S. CONST. art. I, § 9, para. 8; *id.* art. II, § 1, para. 7; *id.* art. III, § 2, para. 1; *id.* art. III, § 3, para. 1; see 1 M. FARRAND, *supra* note 40, at 416 (remarks of James Wilson). We should also note that artful repetition of the words "the United States" enabled the framers to avoid any explicit textual description of the central government as "federal" or "national." See *id.* at 335.

126. See U.S. CONST. art. VI, para. 3 (distinguishing "this Constitution" from old "Confederation"); J. MADISON, *supra* note 59, at 365 (distinguishing "a league of sovereign powers" and a "political constitution by virtue of which they are become one sovereign power").

127. 17 U.S. (4 Wheat.) 316, 407 (1819).

128. Articles of Confederation, 1781, art. III.

it adds references to "establish[ing] Justice" and "insur[ing] domestic Tranquility"—internal matters of government that had lain beyond the limited inter-sovereign scope of the Articles. Truly, the Constitution could hardly be more straightforward in articulating its (literally) primary purpose: the formation of a "more perfect Union."<sup>129</sup> Finally, we must not neglect the silence roaring between the lines of the Preamble: Nowhere is there any reference to the "sovereignty" of the People of "each state" that had been the express animating principle of the Articles.<sup>130</sup>

In fact, the word "sovereignty" never appears in the Constitution,<sup>131</sup> not even in the Tenth Amendment, the Federalist Constitution's counterpart of the Confederation's Article II.<sup>132</sup> Ironically, that Amendment, today typically seen as a pure states' rights provision, contains language that more strongly supports the unitary People thesis than does the Preamble's seemingly more nationalistic opening phrase. For it is exactly the juxtaposition of the Amendment's plural reference to "the states, respectively" and its singular reference to "the People" (and not "their respective People[s]")—a juxtaposition the Preamble lacks<sup>133</sup>—that underscores the unity of the American People and strongly confirms that the Preamble means exactly what it seems to mean at first glance.

Between the Preamble and the Tenth Amendment lie various provisions that strengthen the unitary People thesis. The first six articles ex-

129. See *infra* note 152. Whatever union had existed in America under the Confederation had been imperfect, because each state People had retained its status as a distinct sovereign entity and thus, for example, its right to secede. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.) ("people of the United States form a NATION"); 2 M. Farrand, *supra* note 40, at 666-67 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution) ("It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all . . . . In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence."); Washington, *supra* note 110, at 217 ("To the efficacy and permanency of your union a government for the whole is indispensable. No alliances, however strict, between the parts can be an adequate substitute. . . . Sensible of this momentous truth, you have improved upon your first essay by the adoption of [the] Constitution . . . which at any time exists till changed by an explicit and authentic act of the whole people . . . ."). Leading Anti-Federalists well understood the import of the Preamble's reference to "perfect union." See, e.g., Yates, *Brutus*, in *THE ANTI-FEDERALISTS* 345 (C. Kenyon ed. 1985) (Constitution creates "union of the people of the United States considered as one body").

130. Cf. CONST. OF THE CONFEDERATE STATES OF AMERICA preamble (1861) ("We, the people of the Confederate States, each State acting in its sovereign and independent character . . .") (emphasis added).

131. Cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 454 (opinion of Wilson, J.) (quoted *supra* text accompanying note 57).

132. Compare U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") with Articles of Confederation, 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

133. For other, less illuminating, constitutional references to "the people," see U.S. CONST. art. I, § 2; *id.* amends. I, IV, IX.



PLICITLY establish a national "government" with "legislative,"<sup>134</sup> "executive" and "judicial" powers—all words carefully omitted from the Articles of Confederation's description of its general assembly. The national legislature's pronouncements are expressly described as "laws" enforceable even in state courts. And the provision authorizing the legislature to pass all laws "necessary and proper" to implement its enumerated powers purposely reverses the international law spin of the language of the Articles, which explicitly required a narrow interpretation of federal power.<sup>135</sup> Moreover, the national government can directly carry out its "laws" by reliance on its own, rather than state, executive and judicial officers. Indeed, even when state courts sit as original tribunals in cases arising under the Constitution or national laws, the Constitution requires that some national court sit in appellate review.<sup>136</sup> The first house of the national legislature is directly elected by individuals who are to be proportionately represented, in sharp contrast to the Confederation's one state, one vote rule; and Congress can directly legislate upon, and tax, these individuals.<sup>137</sup> The Constitution defines treason as levying war against, or giving aid or comfort to, enemies of the United States, not any individual state.<sup>138</sup> Taken together, all of these provisions tend to suggest that the Federalist Constitution was simply a continental version—deriving from

134. As with their self-description as "Federalists," *see supra* note 9, supporters of the Constitution rhetorically de-emphasized their break with the Articles of Confederation by continuing to use the word "Congress." Cf. 2 M. Farrand, *supra* note 40, at 135, 152 (first description of Constitution's new bicameral legislature as "Congress" appearing in Committee of Detail drafts, two months after opening of Convention). This rhetorical continuity masked dramatic differences between "Congress" under the Articles and "Congress" under the Constitution. The latter was a true "legislature" and was indeed described as such in the Constitution itself. The framers thus developed vocabularies that would have been oxymoronic twenty years earlier—e.g., "limited sovereignty" and "legislative Congress." Unsurprisingly, later states' rightists placed heavy reliance on the Constitution's use of the word "Congress." *See, e.g.,* J. TAYLOR, *supra* note 81, at 5–6.

135. Compare U.S. CONST. art. I, § 8, para. 18 with Articles of Confederation, 1781, art. II. *See generally* THE FEDERALIST No. 33, at 201–04 (A. Hamilton); *id.* No. 44, at 283–86 (J. Madison). Even the Tenth Amendment purposely omits the word "expressly," which had been the centerpiece of Article II of the Articles. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819); 1 ANNALS OF CONG. 790 (J. Gates ed. 1789).

136. *See* Amar, *supra* note 9, 229–59.

137. Here we see the obvious influence of revolutionary ideology that taxation or legislation without representation is tyranny. Under the Articles, only state governments were represented, and thus only they—and not individuals—could be "requisition[ed]". The Federalists mandated individual representation precisely because they proposed to allow the national government to tax and legislate directly upon individuals. *See* U.S. CONST. art. I, § 2, para. 3 (linking representation and direct taxation by prescribing same formula to compute both).

138. The language of the treason clause reflects careful consideration. The Convention explicitly rejected earlier drafts defining treason as "adhering to the enemies of the United States, or any of them," precisely to make clear that a citizen's paramount allegiance was owed to the sovereign People of the United States, and not to the People of any state, in the event of conflict between the two. 2 M. Farrand, *supra* note 40, at 345–49 (emphasis added); *see* 3 *id.* at 223 (remarks of Luther Martin before Maryland legislature).

one continental People—of earlier state constitutions (deriving from state Peoples) under the league.

The supremacy clause clinches the case. Consider what would happen if the People of South Carolina, having adopted the Federalist Constitution, reconvened at some later time to amend their state constitution. In convention, they adopt an amendment inconsistent with the federal Constitution. In a subsequent lawsuit, which law would a state judge be obliged to follow? If the People of South Carolina were sovereign, the answer would plainly be the state constitution as amended. The sovereign People's right to alter or abolish their government at any time is an inalienable attribute of sovereignty, and the sovereign's judicial agents (state judges) are bound to enforce the sovereign's will even if that will violates an earlier treaty (here, the federal compact) under international law.<sup>139</sup> Yet the supremacy clause explicitly compels even state judges to disregard the attempted amendment—a rule plainly inconsistent with the sovereignty of the People of each state.<sup>140</sup> It is worthy of special note that when the supremacy clause was first introduced at Philadelphia by the strident Anti-Federalist Luther Martin, it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts.<sup>141</sup> Seen through the lens of sovereignty theory, Martin's outrage at the Convention's subsequent modification of the clause is understandable, for the modification decisively repudiated his view that the new Constitution should remain a compact among thirteen sovereign Peoples.<sup>142</sup> A more subtle alteration of Martin's language further undercut his purely confederate design: Whereas Martin's proposal spoke of federal statutes as "the supreme law of the *respective States*,"<sup>143</sup> the Convention proclaimed the Constitution to be "the supreme law of *the land*."<sup>144</sup> Once again the implication was continental: one Constitution, one land, one People.<sup>145</sup>

139. 2 M. Farrand, *supra* note 40, at 93 (remarks of Madison). This is indeed the federal rule. See *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

140. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. CONST. art. VI, para. 2 (emphasis added); cf. 4 J. ELLIOT, *supra* note 52, at 187 (remarks of Governor Johnston at North Carolina ratifying convention) ("The Constitution must be the supreme law of the land; otherwise, it would be in the power of any one state to counteract the other states, and withdraw itself from the Union."); 3 *id.* at 55 (remarks of Patrick Henry at Virginia ratifying convention) ("Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other states.").

141. 2 M. Farrand, *supra* note 40, at 28-29.

142. See R. BERGER, *supra* note 38, at 75, 240; 3 M. Farrand, *supra* note 40, at 287 (Luther Martin's Reply to Landholder); Fletcher, *supra* note 81, at 1065.

143. 2 M. Farrand, *supra* note 40, at 28 (emphasis added) (Martin proposal).

144. *Id.* at 603 (emphasis added) (Committee of Style revision).

145. See THE FEDERALIST No. 2, at 38 (J. Jay) ("Providence has been pleased to give this one

But if earlier state constitutions and the Articles had established the sovereignty of the People of "each state," how, apart from sheer *ipse dixit*, did the Constitution derive the sovereignty of one American People? How did thirteen separate sovereign Peoples magically "consolidate" into one common People? The answer lies in the seventh and final Article: "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

The word "conventions" is used here as an eighteenth century term of art, denoting a special assembly of the People themselves, convened for the special purpose of expressing direct popular sovereignty.<sup>146</sup> Each state's ratifying convention was superior to its ordinary legislature, for the convention *was* in theory the virtual embodiment of the People of that state.<sup>147</sup> It was thus a meta-legal body that could legitimately alter the state's constitution.<sup>148</sup> Since the Federalist Constitution would give national officers powers that had previously been vested exclusively in various state agents, or reserved by the People of each state, under various state constitutions, its adoption would require a pro tanto repeal of those constitutions. Such a modification obviously required the assent of the People themselves.<sup>149</sup> By ratifying the Federalist Constitution, the People

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connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs. . . . [This] band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.").

146. See G. WOOD, *supra* note 20, at 306–89; Ackerman, *supra* note 69, at 1058–70.

147. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("[T]he people acted upon [the Constitution] in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.").

Why was it sensible for Americans to transubstantiate a convention into the virtual embodiment of the People? After all, as with an ordinary legislative assembly, a convention assembly may improve the ultimate quality of public deliberation, *see, e.g.*, THE FEDERALIST No. 55, at 342 (J. Madison), but only by excluding most citizens, thereby raising fiduciary/agency problems. An answer based on organization theory/incentive analysis might focus on how a ratification convention is structured differently from an ordinary legislature in ways that enhance monitoring and improve public accountability. First, the People select convention delegates in a special election. Second, delegates are generally convened to consider a single issue (ratification). Third and related, the basic choice set is binary (yes-no), reducing agenda manipulation problems and decreasing the monitoring problems that exist in an ordinary legislature with virtually infinite possibilities of side deals and vote trading. Fourth, conventions immediately disband and disperse among the People, reducing the problem of legislators entrenching themselves and developing their own institutional perspectives. Finally, a convention enhances a sense of public-spiritedness and individual moral responsibility among both voters and delegates. Calling a "convention" signals to all concerned that the polity is entering a high-stakes moment when basic ground rules will be hammered out. Interestingly, criminal juries (deciding the single issue of individual guilt or innocence) possess many more convention attributes than do ordinary legislatures. Cf. Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984) (comparing legislatures and juries). For further thoughts on the nature of conventions, *see* B. Ackerman, *Discovering the Constitution* (1986) (unpublished manuscript on file with author).

148. Note how Americans legalized and channelled the more lawless-sounding right of revolution. *See* G. WOOD, *supra* note 20, at 342, 613–15; Ackerman, *supra* note 69, at 1020–24, 1058–62.

149. *See* 2 M. Farrand, *supra* note 40, at 92–93 (remarks of Madison).

of each state would exercise their primal power to "alter or abolish" their form of government by withdrawing powers previously delegated to one set of agents and redelegating those powers to a different set.<sup>150</sup>

Ratifications by state conventions, however, would have far more transcendent consequences. It was by these very acts that previously separate state Peoples agreed to "consolidate" themselves into a single continental People. Before ratification, the People of each state were indeed sovereign—and for that very reason could not be bound by the new Constitution if they chose not to ratify, no matter what any of the other sovereign Peoples chose to do.<sup>151</sup> Thus, although Article VII required only nine states to ratify, it *confirmed* the *pre-existing* sovereignty of the People of each state by proclaiming that the Constitution would go into effect only between the nine or more states ratifying.<sup>152</sup> The ratifications themselves thus formed the basic social compact by which formerly distinct sovereign Peoples, each acting in convention, agreed to reconstitute themselves into one common sovereignty. The Gettysburg Address notwithstanding, it was in 1788, and not 1776, that "a new nation" was legally "brought forth upon this continent."<sup>153</sup>

This reading of Article VII synthesizes the antithetical views of extreme states' rightists like Roane and Calhoun, who argued that Americans never became one People, and ardent nationalists like Story and Lincoln, who suggested that Americans had always been one People after Independence.<sup>154</sup> This synthesis is precisely the middle position staked out in vari-

150. See *McCulloch*, 17 U.S. at 404; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 463-64 (1793) (opinion of Iredell, J.); G. Wood, *supra* note 20, at 532-36.

151. See 1 M. Farrand, *supra* note 40, at 179 (remarks of William Paterson) ("Let [large states] unite if they please, but let them remember that they have no authority to compel the others to unite."); *id.* at 123, 483, 541, 593 (similar remarks of James Wilson, Elbridge Gerry, and Gouverneur Morris); see also 2 *id.* at 92-93, 475 (overwhelming Convention rejection of proposals to bind any state People to new Constitution absent their consent).

152. The Preamble's reference to *forming* a more perfect union also seems to recognize the separateness of state Peoples in 1787. Cf. An Act for rendering the Union of the two Kingdoms more intire and compleat, 1707, 6 Anne, ch. 6 (formal union of Scotland and England); 1 M. Farrand, *supra* note 40, at 198, 493 (remarks of Benjamin Franklin and Rufus King) (discussing success of union between England and Scotland); *id.* at 462 (remarks of Nathaniel Gorham discussing success of unions of previously separate colonies to form Massachusetts, Connecticut, and New Jersey).

153. A. LINCOLN, *The Gettysburg Address*, in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 110, at 23 (emphasis added). For a more elaborate exposition of Lincoln's view that one nation emerged immediately and unproblematically from the Declaration of Independence, see his Special Session Message to Congress, fittingly delivered on July 4, 1861:

The original [states] passed into the Union even *before* they cast off their British colonial dependence . . . [T]he object [of the Declaration of Independence] plainly was not to declare their independence of *one another*, or of the *Union* . . . The Union is older than any of the States; and, in fact, it created them as States.

A. LINCOLN, *supra* note 110, at 433-34.

154. Story's argument that the practice of Revolutionary government confirmed the sovereignty of one American People rested heavily on the facts that the continental Congress under the Articles had always wielded large portions of "sovereign" power over international affairs of the highest import, and that the People generally considered members of Congress to be *their* direct agents and not just

ous nineteenth century writings of Chief Justice Marshall.<sup>155</sup> Perhaps more important, the nation-creating implications of Article VII ratification were evident to Americans during the ratification period itself. Thus *The Federalist* No. 33 likened state ratification of the Constitution in convention to a social compact among individuals to form one body politic:

If individuals *enter into* [i.e., form through social compact] a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of [pre-existing] political societies *enter into* a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme *over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government . . .*"<sup>156</sup>

By July 4, 1788, ten state conventions had already ratified the Federalist Constitution—enough to put the new document into effect under Article VII. "'Tis done," wrote Dr. Benjamin Rush on the twelfth anniversary of the Declaration to which he had been a signatory. "We have become a nation."<sup>157</sup>

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delegates of their state governments. Yet those points cast doubt only on the notion that Revolution-era continental government rested on the sovereignty of state governments; they do not affirmatively establish the sovereignty of the People of America in contradistinction to the People of each state. Even in the work of the great Justice, it seems that the garbled nature of the sovereignty debate created analytic confusion and a conflation of two distinct dichotomies: government versus People and state versus national.

155. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (Marshall, C.J.) ("[R]eference has been made to the political situation of [the] States, anterior to [the Constitution's] formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change . . ."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389, 413-14 (1821) (Marshall, C.J.); Marshall, *supra* note 49, at 195-200; see also D. WEBSTER, *supra* note 119, at 454-55, 472-77 (similar).

156. THE FEDERALIST No. 33, at 204 (A. Hamilton) (emphasis added); accord J. MADISON, *supra* note 59, at 365 (defining "constitution" as "instrument by which [separate states] are become one sovereign power" (emphasis added)); see 2 M. Farrand, *supra* note 40, at 666 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution) ("Individuals *entering into society*, must give up a share of liberty to preserve the rest.") (emphasis added); 1 J. ELLIOT, *supra* note 52, at 334 (ratification instrument of Rhode Island) (referring to "social compact," and not inter-sovereign "federal" compact or compact between pre-existing People and its rulers); *id.* at 322, 326 (ratification instruments of Massachusetts and New Hampshire) (similar); 3 *id.* at 657 (Declaration of Rights and Amendments of Virginia ratifying convention) (similar). See generally J. LOCKE, *supra* note 41, § 14 (distinguishing between league and pact "to enter into one community and make one body politic"); A. McLAUGHLIN, *supra* note 25, at 66-85 (similar); G. WOOD, *supra* note 20, at 259-305 (discussing social compact ideas).

157. C. BOWEN, MIRACLE AT PHILADELPHIA 310 (1986). The leading Anti-Federalist pamphlets shared this understanding of Article VII ratification. See Lee, *Letters of a Federal Farmer*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 277, 311 (P. Ford ed. 1888) ("[W]hen the people [of each state] shall adopt the proposed constitution it will be their last and supreme act; it will

This understanding of Article VII is reinforced by comparing it with Article V, which provides that ratification by conventions of three-fourths of the states suffices to amend the Constitution in a way that will bind even nonratifying states. Even as late as July, 1788, the People of New York, as a distinct sovereign entity, were legally free to vote down the new Constitution and refuse to comply with it.<sup>158</sup> However, New Yorkers knew that if they ratified the document in convention, they would lose their freedom to disregard any subsequent constitutional proposal agreed to by enough other conventions. Nowhere was the Constitution's break with the Articles of Confederation—and indeed, all other multiple-sovereign, federal regimes<sup>159</sup>—more dramatic.<sup>160</sup> Simply put, Article VII recognized the pre-existing sovereign right of any non-ratifying state to *secede* from its sister states;<sup>161</sup> Article V prospectively abolished that sovereign right for each state People who joined the Union, thereby melting themselves into the larger common sovereignty of the People of America.<sup>162</sup> *E Pluribus Unum*.<sup>163</sup>

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be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States . . . ." (emphasis added)); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, in *THE ANTIFEDERALISTS* 46 (C. Kenyon ed. 1985) [hereinafter *Pennsylvania Minority*] (Preamble worded in "style of a compact between individuals entering a state of society, and not that of a confederation of States"); *Agrippa*, in *id.* at 150 (similar); Yates, *supra* note 129, at 345 ("this constitution, if it is ratified, will not be a compact entered into by states, in their corporate capacities, but an agreement of the People of the United States, as one great body politic"); see also 3 J. ELLIOT, *supra* note 52, at 22, 44 (remarks of Anti-Federalist Patrick Henry) ("If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states. . . . Here is a resolution as radical as that which separated us from Great Britain.").

158. Indeed, North Carolina and Rhode Island did not ratify the new Constitution until months after it had gone into operation in the other states under Washington's presidency.

159. The point made here about Article VII is in some ways the mirror image of the point made earlier about Article VI. The People of the United States may amend their Constitution in a way that violates the state constitution of South Carolina, but the People of South Carolina may not amend their state constitution in a way that violates the Constitution of the United States. Both of these conclusions logically follow from the same premise: Only the People of the United States as a whole are sovereign. Conversely, both articles are logically inconsistent with the states' rights theory of popular sovereignty. See 2 M. Farrand, *supra* note 40, at 557-58 (remarks of Elbridge Gerry and Alexander Hamilton).

160. Cf. 1 M. Farrand, *supra* note 40, at 250 (remarks of William Paterson) (discussing amendment provisions of Articles of Confederation) ("This is the nature of all treaties. What is unanimously done, must be unanimously undone.").

161. See, e.g., *THE FEDERALIST* No. 43, at 280 (J. Madison) ("no political relation can subsist between assenting [i.e., ratifying] and dissenting States"). Strictly speaking, it is perhaps more accurate to view the ratifying states as seceding from the Confederation by abrogating the Articles. In any event, a recurrent theme of *The Federalist* and the earlier Philadelphia Convention is that government under the Articles is at an end, and that the two alternatives are therefore "reunion" under the Federalist Constitution, *id.* (emphasis added), or dissolution (i.e., secession) and recombination of individual states into two or more competing nations/confederacies. See *THE FEDERALIST* No. 1, at 37 (A. Hamilton); *id.* No. 8, at 71 (A. Hamilton); *id.* No. 15, at 112 (A. Hamilton); *id.* No. 23, at 157 (A. Hamilton); 1 M. Farrand, *supra* note 40. See generally *THE FEDERALIST* No. 5 (J. Jay) (discussing evils that would result "should the people of America divide themselves into three or four nations"); *id.* Nos. 6-8 (A. Hamilton) (similar).

162. Admittedly, the text of Article V does not address secession in so many words—nothing in

## 2. Confederate Vestiges, Union Responses

The sovereignty of the People of the United States marked a sharp break with the logic of the Articles. Yet the break was not a completely clean one. In several crucial respects, the Federalist Constitution seemed to fall short of perfecting the sovereignty of the People of America. To begin with, many persons, slaves being the most obvious example, found themselves excluded from "the People" by a definitional fiat that seriously eroded the moral force of the Federalist vision of popular sovereignty.<sup>164</sup>

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the Constitution does. Nevertheless, the plain import of that Article and the rest of the document is flatly inconsistent with the states' rights theory of popular sovereignty that underlies the claimed right of secession. It is a great mistake to assume that the secession question was some purely abstract hypothetical that the pragmatic Federalists left open for future resolution. The spectre of imminent secession haunted their every thought. See *supra* note 161. Indeed, we do well to remember, as Jefferson Davis so vigorously insisted, that the Constitution itself was born in an act of secession. See 1 J. DAVIS, *supra* note 40, at 99–103. Davis, however, drew the wrong conclusion from this premise: He presumed continuity between the Constitution and the Articles regarding the ongoing permissibility of secession in the very same breath in which he established a discontinuity between them created by secession itself. One of the Federalists' paramount goals was to constitute their new system in a way that would give no color to later state claims of a right to secede. See, e.g., 1 M. Farrand, *supra* note 40, at 467 (remarks of Hamilton) ("This was the critical moment for forming . . . [a national] government. . . . It is a miracle that we are here . . . . It would be madness to trust to future miracles."); 2 *id.* at 92–93 (remarks of Madison) (The "true difference between a *league* or *treaty*, and a *Constitution*" is that "in the case of treaties . . . a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation."); cf. THE FEDERALIST No. 22, at 152 (A. Hamilton) (similar); *id.* No. 11, at 91 (A. Hamilton) (speaking of "strict and indissoluble" union); 2 J. ELLIOT, *supra* note 52, at 463 (remarks of James Wilson at Pennsylvania ratifying convention) ("bonds of our union ought therefore to be indissolubly strong"). It should also be noted that no state convention attempted to reserve the right of secession. See 11 THE PAPERS OF JAMES MADISON 189 (R. Rutkind & C. Hobson eds. 1977) (letter from James Madison to Alexander Hamilton) ("Constitution requires an adoption *in toto*, and *for ever*"); A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 214–19 (1935). Madison's, Hamilton's, and Jay's brilliant discussions of the threats to internal liberty and tranquility that would arise from disunion—the need for standing armies, the strengthening of executive power, the dangers of European intrigue and intervention in American affairs—powerfully confirm and justify the impermissibility of unilateral secession under "the more perfect union" formed under the Federalist Constitution. See THE FEDERALIST No. 5 (J. Jay); *id.* Nos. 6–8 (A. Hamilton); 1 M. Farrand, *supra* note 40, at 464–65 (remarks of Madison). The strongest historical evidence against secession, however, was not what the Federalists said but what they did not say. To my knowledge, no major proponent of the Constitution sought to win over states' rightists by conceding that states could unilaterally nullify or secede in the event of perceived national abuses. The Federalists' silence is especially impressive because such a concession might have dramatically improved the document's ratification prospects in several states. Instead, the Federalists sought to blunt Anti-Federalist concern about federal abuses by emphasizing bicameralism, separation of powers (especially judicial review), refinements in principles of representation, future amendments under Article V, and various federalism checks short of interposition, nullification, and secession. See generally *infra* Section III.

163. "Out of many, one." Thus, the most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People, who may alter their government or supreme law at will. To turn the words of the arch states' rightist Spencer Roane against him, "The *people* only are supreme. The Constitution is subordinate to them. . . . [T]he authority of constitutions over government, and of the people over constitutions, are truths which should be ever kept in mind." Roane, *supra* note 103, at 130–31 (quoting Virginia Report of 1799).

164. Indians, women, and the poor also faced barriers to equal political participation.

Indeed, the Constitution itself provided no clear definition of national citizenship. Yet if the People of America were sovereign, then one's American citizenship was all-important, and should never have been treated as simply derivative of one's state citizenship under state constitutions, or subject to virtually limitless manipulation by ordinary legislation.<sup>165</sup> Additionally, the suggestion of Article V that no state could lose its equal representation in the Senate without its own consent appeared to crimp the sovereign power of the People of the nation to alter their government by constitutional amendment. Harking back to the pure federalism of the Articles' requirement of unanimous amendment, the Senate clause of Article V seemed to deny the sovereign right of the People of America to impose their changed will on a tiny but recalcitrant localized minority.

It is remarkable that the Reconstruction Amendments can be seen as perfecting the Federalist Constitution by trimming off its confederate vestiges. For our purposes, the most significant constitutional development of this era was not the general federal guarantee of individual rights against states embedded in the due process and equal protection clauses, provisions that dominate current constitutional scholarship. While of course momentous, these clauses can be seen as simply expanding the substantive scope of the Federalist Constitution's Article I, section 10 catalogue of federally enforceable individual rights against states. Of far greater significance here are the Thirteenth Amendment's abolition of slavery; the Fourteenth's constitutional definition of national birthright citizenship and its prohibition against exclusion by definitional fiat; the Fourteenth and Fifteenth Amendments' specific protections of equality of franchise; and the process of ratification itself, which, as Professor Ackerman has pointed out, swept aside the formal limitations of Article V in order to vindicate the American People's sovereign right to alter their government.<sup>166</sup>

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165. Even if not strictly compelled by the logic of sovereignty, surely a popular—that is, a constitutional—rule defining who counted as part of the polity was called for (just as Parliament would never dream of delegating the power to set the qualifications of its members to some other body). Instead, however, the Constitution could be read as allowing the vital issue of national citizenship to be decided by state law except in cases of naturalization. The complex legal issues concerning the source of antebellum citizenship were never fully resolved. See J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870*, at 248–351 (1978).

166. Thus, I share Professor Ackerman's view that popular amendment cannot be cabined by the formal niceties of Article V. See Ackerman, *supra* note 69, at 1056–69 (arguing that Constitution can be and has been amended by modes of popular referenda transcending purely "formal" reading of Article V); B. Ackerman, *supra* note 147 (similar). My argument is simply the structural complement of Professor Ackerman's basic textual one; he points to the textual references to "Conventions" in Article V, whereas I am offering here a structural account of the sovereignty of the American people that undergirds the textual reference to "Conventions."

The constitutional amendments of the Progressive era carry on the Reconstruction tradition, both in extending participation to a group of persons previously excluded from politics by definitional fiat, see U.S. CONST. amend. XIX (women's suffrage), and in further eroding the Senate clause of Article V, see *id.* amend. XVII (direct election of senators).



### 3. *The Role of the States*

Relocating sovereignty in the People of the United States in the late 1780's did not obliterate all state lines; it only established that any power exercised by state Peoples and state governments was ultimately subject to the absolute control of the American People.<sup>167</sup> Nothing prevented that sovereign from adopting a constitution that allowed state structures to continue to exist and wield delegated power.<sup>168</sup> Such was the design of the Federalist Constitution. For example, Article V itself generally looked to states, rather than individuals, as the unit of measure for tallying ratifications of constitutional amendments.<sup>169</sup> Indeed, states were woven into the

167. Notwithstanding the Supreme Court's slogan that ours is "an indestructible union, composed of indestructible states," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), "We the People of the United States" may choose to destroy states by constitutional amendment. Of course, there are excellent reasons why we should choose not to. See *infra* Section III.

More realistically, Americans might desire to amend the Constitution to require periodic redistricting of state boundaries to ensure that the Senate's equally represented states have equal size, or to modify equal representation itself. Not only would these amendments be constitutional, despite the special limitations of Article V's Senate clause, but such amendments could come into being even without satisfying the Article's general mechanism of tallying ratification according to a one state, one vote rule. To contest this is to deny the sovereign right of the People to alter their government at any time for any reason, and to attempt to bind the source of all law—the sovereign People—with a law of its own creation. See *supra* text accompanying notes 22–45. Of course, the obvious objection to my argument is that it ignores the clear mandate of Article V to the contrary. Only two brief responses can be sketched here. First, as Professor Ackerman has persuasively argued, a sensitive reading of Article V's reference to "Conventions" suggests that the framers themselves recognized the futility and foolishness of any hard and fast mode of channelling future acts of true popular sovereignty. See Ackerman, *supra* note 69, at 1058–62; B. Ackerman, *supra* note 147. Second and more fundamental, the People of 1787 were incapable of binding a future convention of the People, even if they had tried. Indeed, the modes by which various state ratifying conventions exercised popular sovereignty in 1787–1788 seemed to violate the formal provisions for constitutional amendment prescribed by pre-existing state constitutions. See *A Republican Federalist*, in *THE ANTIFEDERALISTS*, *supra* note 129, at 112, 121–22 (Massachusetts); *Pennsylvania Minority*, *supra* note 157, at 32–33 (Pennsylvania). See generally Kahn, *Gramm-Rudman and the Capacity of Congress To Control the Future*, 13 *HASTINGS CONST. L.Q.* 185 (1986) (discussing legitimacy problems raised whenever body tries to bind itself). Nor does this understanding of the inalienable right of (a deliberate majority of) the People to change their government render Article V a nullity. It continues to have legal force as the rule of recognition for ordinary constitutional amendment, and moral force as a promise made by the sovereign—even though such a promise cannot be legally enforced by the sovereign's judicial agents against the sovereign absent its ongoing consent. See *infra* text accompanying notes 185–88. Thus, disregard of Article V in, say, 1790 would have been a plain breach of faith with those who voted for the Constitution in reliance on the mechanisms of that Article. Any breach of faith argument, however, seems limited to the founding generation itself, and loses much of its force when applied to Reconstruction (when the limitations of Article V were first transcended, see B. Ackerman, *supra* note 147) or to the twentieth century: None of the original voters were/are around to call "foul" persuasively.

168. For example, the People of America could in 1788 choose to deviate from proportionate representation in selecting their Senate, just as the People of Maryland did in 1776. See *MD. CONST. of 1776 arts. XIV–XV*, in 3 F. THORPE, *supra* note 50, at 1693–94 (giving unequal sized counties equal weight in selecting state Senators); *infra* note 169.

169. For an important qualification, see *supra* notes 166–67; cf. T. JEFFERSON, *A Draft Constitution for Virginia*, in *THE PORTABLE THOMAS JEFFERSON*, *supra* note 102, at 242 n.1 ("It is proposed that this bill, after correction by the Convention, shall be referred by them to the people to be assembled in their respective counties and that the suffrages of two thirds of the counties shall be requisite to establish it."); J. CALHOUN, *supra* note 104, at 146 (if People of America are sovereign, states would "bear to the Union the same relation that counties do the states"); 6 *CONG. DEB.* 269

very fabric of the new national government's political departments.<sup>170</sup> Finally, and most importantly for our purposes, the Federalist Constitution preserved the independent lawmaking authority of state governments. The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution: Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.

Thus, state governments would continue to enjoy power to make law, power derived from the sovereign People. To what extent did that derivative "sovereignty" also imply a "sovereign" immunity from legal liability? To that question we now turn.

## II. SOVEREIGN IMMUNITY AND THE FEDERALIST CONSTITUTION

The sovereignty of "We the People of the United States" is admittedly an abstraction—an idea. But abstractions often have legal consequences. And the single idea of popular sovereignty generates a powerful set of legal implications covering a vast range of constitutional issues from limited government and judicial review to federalism and separation of powers to nullification and constitutional amendment. In one vital area of contemporary jurisprudence, however, the Supreme Court has fashioned doctrine wholly antithetical to the Constitution's organizing principle of popular sovereignty. By allowing both federal and state governments to invoke "sovereign immunity" from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth. In effect, the Court has transformed "sovereignty" into the very tool of government supremacy that our Revolutionary forebears wielded pen and sword to destroy.<sup>171</sup>

(1830) (remarks of Sen. Edward Livingston) (similar).

170. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The point is strongest with respect to the Senate, which preserved two central features of the Congress under the Articles: election by state legislatures and equal representation of each state. Yet even here, these similarities should not blind us to the many ways in which the Federalists constituted the Senate as an entity more nationalistic than the old Congress. The Federalists replaced bloc voting by states with per capita voting by Senators; increased sixfold the term of office (and thus enhanced the likelihood of Senators' developing national sentiments and attachments); abolished recall by state legislature; eliminated all limitations on reelection; required salaries to be paid by the national government; and gave the Senate, as well as the House, powers to discipline and even expel its members and compel their attendance (powers lacking under the Articles, given Congress's status as a mere diplomatic assembly). See 4 J. ELLIOT, *supra* note 52, at 60 (remarks of William Davie at North Carolina ratification convention); *The Federalist on Federalism*, *supra* note 83, at 1281-82.

171.

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the

Although the issue of sovereign immunity for constitutional wrongs implicates both state and federal governments—both are limited under the Constitution—the issue first arose under the Federalist Constitution in *Chisholm v. Georgia*, a case concerned only with state immunity.<sup>172</sup> A detailed review of *Chisholm*—the first major constitutional case decided by the Supreme Court—will illuminate the text of the Eleventh Amendment, which overruled the case, as well as general structural principles of state and federal sovereign immunity.

#### A. *Chisholm v. Georgia*

In 1792, the executor of a South Carolina merchant brought an assumpsit action in the Supreme Court against the state of Georgia for breach of a war supplies contract. Georgia declined to argue the case at bar and instead filed a written objection asserting the state's "sovereign" immunity from suit.<sup>173</sup> Five Justices heard the case and delivered individual seriatim opinions. Perhaps because Georgia's tactics created an awkward procedural posture requiring the state to present sovereign immunity as a jurisdictional bar rather than a defense on the merits of assumpsit, all five Justices tended to collapse the two distinct questions posed by the case. First, the jurisdictional issue proper: Did the Court have original jurisdiction to entertain the case? Second, the rule of decision question: Did an action in assumpsit lie in federal court for a state's breach of a contract it had made with a citizen? Four Justices answered yes to both questions; Justice Iredell dissented.

The jurisdictional issue called for close examination of Article III and the Judiciary Act of 1789. The former vests the federal judiciary with jurisdiction over nine separate but overlapping categories of cases. The first three are defined by subject matter; all federal question and admiralty cases, for example, are cognizable in federal court regardless of the identity of the parties to the suit. The last six categories are defined by party status. Federal diversity jurisdiction over controversies "between cit-

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individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.

THE FEDERALIST No. 45, at 289 (J. Madison).

172. 2 U.S. (2 Dall.) 419 (1793).

173. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 48 (1972).

izens of different states" is today probably the best known example, but three other diverse party categories are of special importance in framing the issue of state sovereign immunity: "Controversies between two or more States;—between a State and Citizens of another State; [and between] . . . a State . . . and foreign States, Citizens or Subjects."<sup>174</sup> Even in the absence of a federal question or admiralty issue, any of these diverse party configurations suffices to confer federal jurisdiction. Indeed, in these three state diversity categories, Article III provides for original jurisdiction in the Supreme Court itself, a grant confirmed by the language of section 13 of the Judiciary Act of 1789.<sup>175</sup>

As a civil suit brought by a citizen of one state against another state, *Chisholm* seemed to fall squarely within the language of both Article III and the Judiciary Act. Georgia apparently argued that these texts should be read to confer jurisdiction only where a state brought suit against an out-of-state citizen, but not vice versa.<sup>176</sup> Yet as the four majority Justices noted, the text of Article III on its face applies symmetrically to both party alignments.<sup>177</sup> The implication of symmetry is even stronger in the language of section 13,<sup>178</sup> given that other portions of the Judiciary Act are expressly asymmetric.<sup>179</sup>

In response to the contention that Georgia's sovereign status required an extremely narrow reading of the jurisdictional provisions of Constitution and statute—an early version of a strict construction, states' rights, clear statement doctrine—the majority Justices offered two related arguments. First, American states were not "sovereign" in the same way European governments claimed to be:

174. U.S. CONST. art. III, § 2, para. 1.

175. Section 13 provides:

[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its own citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

1 Stat. 73, 80 (1789).

176. Professor Maeva Marcus has kindly furnished me with a copy of a Dec. 14, 1792 resolution of the House of Representatives of Georgia, which apparently served as the text of Georgia's remonstrance before the Supreme Court. See *General Advertiser* (Philadelphia), Feb. 6, 1793.

177. See, e.g., *Chisholm*, 2 U.S. at 466 (opinion of Wilson, J.) ("Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.") (emphasis deleted).

178. See *supra* note 175.

179. In implementing the Article III grant of jurisdiction over "controversies to which the United States shall be a Party," section 9 of the Act provided for district court jurisdiction only when the United States was party plaintiff. Section 13 itself distinguished between suits brought *against* "ambassadors, or other public ministers" and suits brought *by* them.

It is unlikely that Congress overlooked the issue of a state defendant's amenability to suit at the behest of an out-of-state citizen plaintiff, for the issue had been hotly debated only months earlier during the ratification process. See Fletcher, *supra* note 81, at 1047-52; Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902-14 (1983).

In *Europe* the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people . . . .

[Federal jurisdiction] enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.<sup>180</sup>

Second, in adopting the Constitution, the sovereign American People had imposed important limitations on the "sovereign" powers of state officers, limitations that necessarily implied that states could be sued in federal court. Article III conferred federal jurisdiction in controversies "between two or more States." Obviously, one of these states had to be a defendant; the provision was meaningless otherwise.<sup>181</sup> Similarly, effective vindication of various individual constitutional rights against states might require a compulsive suit against the state itself in federal court under the Article III grant of federal question jurisdiction.<sup>182</sup> These provisions, the majority Justices noted, argued conclusively against any general theory of a state's "sovereign" immunity from suit in federal court.

Up to this point, the majority's logic was impeccable. Yet upon reaching this analytic juncture, the majority leaped to a conclusion that simply did not follow from its premises, committing what in our post-*Erie*<sup>183</sup> world seems an obvious category mistake. Having established the Court's power to entertain the case (and the suability of Georgia in a *jurisdictional* sense), the majority proceeded to opine that a cause of action in *assumpsit* would properly lie (and that the state was properly suable in this *substantive* sense) notwithstanding any immunity from *assumpsit* liability under state law.<sup>184</sup> Under the common law of Georgia and, apparently, every other state, no cause of action lay for a breach of contract by the state itself. At common law, such contracts, though perhaps morally binding, were not legally enforceable.<sup>185</sup>

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180. *Chisholm*, 2 U.S. at 472, 479 (opinion of Jay, C.J.).

181. See *id.* at 421-22 (oral argument of Edmund Randolph); *id.* at 450-51 (opinion of Blair, J.); *id.* at 466-67 (opinion of Cushing, J.); *id.* at 473 (opinion of Jay, C.J.).

182. See *id.* at 422 (oral argument of Randolph); *id.* at 465 (opinion of Wilson, J.); *id.* at 468 (opinion of Cushing, J.).

183. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (federal jurisdiction does not necessarily include power to disregard state substantive law as rule of decision in federal court).

184. Chief Justice Jay's opinion on this point, however, is murky. Despite broad language in earlier passages, his final paragraph seems to leave open the possibility of recognizing future substantive defenses raised by the state defendant. See *Chisholm*, 2 U.S. at 479.

185. As Alexander Hamilton wrote: "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive [i.e., legal] force. They confer no *right of action* independent of the sovereign will." *THE FEDERALIST* No. 81, at 488

What, then, justified the majority's disregard of Georgia's immunity from liability under her own law? After all, the Tenth Amendment plainly reserves to states the power to fashion any law, common or statutory, not inconsistent with the higher laws of the federal Constitution, congressional statutes, or state constitutions. Indeed, section 34 of the Judiciary Act—the so-called Rules of Decision Act—expressly charges federal courts to follow “the laws of the several states” as residuary “rules of decision” in trials at common law.<sup>186</sup>

We must be clear about what the Court did *not* say. The majority Justices did not claim that Georgia's common law rule of state immunity violated any higher law, constitutional or statutory. In particular, they did not claim that such a common law rule might violate the Constitution's contracts clause.<sup>187</sup> Plaintiff never raised the contracts clause or any other violation of federal right. Jurisdiction rested exclusively on diverse party status. Indeed, had the Court viewed *Chisholm* as a contracts clause case as well as a diverse party suit, a serious question might have arisen about its appropriateness for the original jurisdiction of the Supreme Court, whose general federal question jurisdiction was only appellate.<sup>188</sup>

The majority's only arguments for recognizing an assumpsit cause of action against Georgia were arguments sounding in what would today be labelled “general common law.” In this respect, *Chisholm* anticipated *Swift v. Tyson*,<sup>189</sup> which allowed federal courts sitting in diversity cases to disregard state common law as defined by state courts, and instead fashion their own judge-made law. At oral argument in *Chisholm*, plaintiff ar-

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(emphasis added).

186. The Judiciary Act of 1789, § 34, 1 Stat. 73, 92. As an assumpsit action in federal court, *Chisholm* fell squarely within the terms of section 34, yet none of the five Justices mentioned that section.

187. Although *Chisholm* does contain several references to the clause, see 2 U.S. at 422 (oral argument of Randolph); *id.* at 465 (opinion of Wilson, J.); *id.* at 469 (opinion of Cushing, J.), these were simply illustrative of future cases that might come before the Court.

188. This question was eventually resolved in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In light of subsequent cases like *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810) (applying contracts clause to state contracts), the absence of the contracts clause from the analysis and oral argument in *Chisholm* seems curious. One possible explanation is that the clause was not intended to have any retroactive effect on contracts with states made before ratification. To give state creditors a legally enforceable claim when they had only bargained for a moral obligation might have been viewed as unjust enrichment. Indeed, such a dramatic change in legal rules in the middle of the contract seems wholly antithetical to the spirit of the contracts clause itself. See *Chisholm* 2 U.S. at 479 (opinion of Jay, C.J.) (“I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.”). Alternatively, perhaps the clause was designed only to prevent the impairment of a pre-existing legal obligation, but not to create a legal obligation where none had previously existed, as with state contracts. Under this logic, *Fletcher* itself is suspect. This thesis might also explain why Hamilton nowhere mentions the contracts clause to qualify his sweeping claim that state contracts never legally bind the state.

189. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

gued that assumpsit liability followed automatically from the state's capacity, as a juridical entity, to make a promise. The continental jurist Vattel was the only authority cited for this bold proposition.<sup>190</sup> Similarly, Justice Wilson simply invoked "general principles of right and equality" and "general jurisprudence" in support of his claim that "a State, for the breach of a contract, may be liable for damages."<sup>191</sup>

Indeed, the state-citizen diversity case of *Chisholm* foreshadowed the citizen-citizen diversity suit of *Swift* in an even more precise way: Whereas *Swift* established a jurisprudence of general commercial law, *Chisholm* rested in part upon principles of general corporate law. According to Justice Cushing, "[A]ll states whatever are corporations or bodies politic. The only question is, what are their powers? . . . I think assumpsit will lie, if any suit; provided a state is capable of contracting."<sup>192</sup> A similar general corporate law motif can be heard in Chief Justice Jay's language:

[T]he obvious dictates of justice, and the purposes of society . . . [demand that] in certain cases one citizen may sue forty thousand; for where a *corporation* is sued, all the members of it are actually sued, though not personally, sued . . . Will it be said, that the fifty odd thousand citizens in Delaware being *associated* under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, *associated* under their *charter*, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?<sup>193</sup>

Although Justice Iredell dissented, his opinion accepted many of the majority's premises. He wholeheartedly agreed with the majority view that ultimate sovereignty lay in the People; that by adopting the Constitution, the People had imposed important limitations on states; and that states were therefore sovereign only in a limited and derivative sense.<sup>194</sup>

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190. *Chisholm*, 2 U.S. at 428.

191. *Id.* at 456, 458, 465.

192. *Id.* at 468-69.

193. *Id.* at 472 (emphasis altered).

194.

Every state in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered.

*Id.* at 435 (emphasis omitted). Further, he wrote, states possess "as to every thing simply relating to themselves, the fullest powers of sovereignty, and yet in some other defined particulars [are] subject to a superior power composed out of themselves for the common welfare of the whole." *Id.* at 447. Both state and central governments derive "authority from the same pure and sacred source[.]" . . . *The voluntary and deliberate choice of the people.*" *Id.* at 448.

Indeed, Iredell even acknowledged that for some purposes, states might usefully be treated as corporations.<sup>195</sup> On all these basic points, then, the *Chisholm* Court was unanimous.

Yet for Iredell these premises did not lead to the majority result of a general federal corporate law of state assumpsit liability. If the majority anticipated *Swift v. Tyson's* doctrine of a general federal common law, Iredell presaged *Erie Railroad Co. v. Tompkins'* repudiation of that doctrine.<sup>196</sup> The liability of the state in assumpsit, he argued, should be determined not by general federal common law, but by antecedent state law.<sup>197</sup> And under a state common law rule of unquestioned constitutionality, no assumpsit lay against Georgia. For Iredell, Georgia's "sovereign" immunity was therefore exactly coextensive with her derivative "sovereign" lawmaking capacity: A state could use its lawmaking power to adopt rules immunizing itself from liability, as long as such immunity frustrated no higher-law restrictions on the state's limited sovereignty.

Thus, Iredell carefully limited his discussion to pure diverse party cases against states, in which jurisdiction did not rest upon a substantive federal cause of action based on a congressional statute or the self-executing provisions of the Constitution. The particular question before the Court was for Iredell a narrow one: "[W]ill an action of *assumpsit* lie against a State? This particular question [must be] . . . abstracted from the general one, viz. Whether, a State can in any instance be sued?"<sup>198</sup> Although no assumpsit suit lay against Georgia on principles of "general jurisprudence," Iredell conceded that a different result might obtain in a federal question case "relat[ing] to the execution of the . . . authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself)." In such cases, state "sovereignty has . . . been . . . delegated to the United States . . .

195. *Id.* at 447 (quoted *supra* text accompanying note 36). For further illustrations of the Federalists' self-conscious analogy between state governments and corporations, see 1 M. Farrand, *supra* note 40, at 331-32 (remarks of Rufus King); *id.* at 323, 328 (remarks of Hamilton); *id.* at 357, 471 (remarks of Madison); *id.* at 552 (remarks of Gouverneur Morris); Gibbons, *supra* note 179, at 1896-98.

196. See *supra* note 183.

197. Since he read the relevant congressional statutes to incorporate state law, Iredell did not reach the question of congressional power to displace state law rules of decision in diversity-type controversies. On this count, the *Erie* Court went further when it suggested that the diversity and necessary and proper clauses standing alone did not empower Congress to enact a general federal statutory rule of decision or to authorize a general federal common law.

Iredell also diverged from *Erie* in his emphasis on state law at the time of the ratification of the Constitution and adoption of the Judiciary Act instead of at the time of the lawsuit. This freezing of state law more closely resembles the static conformity methodology of the federal Process Acts of 1789 and 1792, see C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 61 (4th ed. 1983), than the dynamic conformity methodology required by *Erie* and the Rules of Decision Act. On this point, as elsewhere, the *Chisholm* Court's failure to focus on the latter act both reflected and generated dubious analysis.

198. *Chisholm*, 2 U.S. at 430.



wherein the separate sovereignties of the States are blended in one common mass of supremacy."<sup>199</sup>

In closing, Iredell did write that he was inclined to believe that full vindication of congressionally-created and constitutional rights would never require "a compulsive suit against a State for the recovery of money." However, he took special pains to make clear that his musings on this "delicate topic" were pure dicta subject to reconsideration should the issue squarely arise in a subsequent case.<sup>200</sup>

### B. *The Eleventh Amendment*

The Court's decision in *Chisholm* provoked a chorus of calls around the country for a constitutional amendment. The text eventually agreed upon—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State"—was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding. From that simple starting point, the Supreme Court has arrived at the following interpretation of the case and the Amendment: The defect of *Chisholm* was its failure to recognize absolute state sovereign immunity from citizen suits in all circumstances, and this defect was corrected by enshrining such immunity in the Constitution. No individual can sue her own or any other state in federal court unless the defendant's constitutional immunity is in some special way waived or abrogated.<sup>201</sup> Sovereign immunity ousts all federal jurisdiction, whether in law, equity, or admiralty; whether the suit is based on state law, congressional statute, or the Constitution itself; and whether or not state liability would most fully remedy a constitutional wrong perpetrated by the state itself. The state thus enjoys "sovereign" immunity even when it has violated a limitation on that sovereignty imposed by the ultimate sovereign, the American People.

All of this is, in a word, nonsense. There exists another reading of the

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199. *Id.* at 432, 435.

200. *Id.* at 449–50.

201. The Court has conceded that Congress has power under the Civil War Amendments to abrogate states' immunity, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and that a state may waive its immunity, see *Clark v. Barnard*, 108 U.S. 436 (1883), but has manipulated clear statement doctrines to choke off both abrogation and waiver, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974). The Court's claim that this hostility is justified by its general rule against inferring "the surrender of constitutional rights," *Atascadero*, 473 U.S. at 238 n.1, is doublespeak. Current Eleventh Amendment jurisprudence typically protects a classic unconstitutional right—the right of the state to violate plaintiffs' constitutional rights and get off scot-free. As for the Court's self-proclaimed concern with avoiding constructive waivers of constitutional rights, consider *Wainwright v. Sykes*, 433 U.S. 72 (1977) (expanding category of waiver of constitutional rights by criminal defendants).

Eleventh Amendment that does far more justice to constitutional text, history, and structure. More important, this neo-Federalist reading does far more justice to the People of the United States, to those revolutionaries who dedicated their lives to bequeath us limited governments, and to those today who claim their distinctive legacy of the rule of law under constitutional government. Under this reading, the defect of *Chisholm* was its displacement of the prevailing state common law of government immunity with a "general" common law of state assumpsit liability *in a case presenting no question of substantive federal law*. The Amendment's cure for *Chisholm*'s case of *Swift*'s disease, however, was not the *Erie* prescription that federal courts follow state law in diverse party cases, but the simple elimination of two categories of diverse party jurisdiction: those involving noncitizen or foreign plaintiffs and state defendants.<sup>202</sup> This ju-

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202. This way of conceptualizing *Chisholm* and the Eleventh Amendment raises two interesting questions. First, why did the framers of the Amendment opt for jurisdictional repeal instead of an *Erie*-style rule of decision amendment? Second, if the evil of *Chisholm* was simply its creation of a federal common law, why didn't the Eleventh Amendment's jurisdictional repeal include ordinary diversity cases as well, where federal courts predictably might also attempt to apply (and in fact later did apply) a general federal common law? Each question admits of a variety of answers, only a few of which may be tentatively sketched here.

In answer to the first question, I would stress that: (1) Following Georgia's lead in *Chisholm* itself, states' rights advocates tended to frame the sovereign immunity issue in jurisdictional (and not rule of decision) terms, a conceptualization that tended to lead to a jurisdictional solution. (2) A clear rule of decision amendment strictly binding federal courts might well have been more difficult to draft than a jurisdictional repeal that could simply track the language of Article III. After all, the language of the Rules of Decision Act itself seems crystalline, yet all of the Justices in *Chisholm* had ignored it. (3) States' rights advocates, distrustful of the ways in which federal courts might continue to manipulate rules of decision once seized of jurisdiction, may well have preferred a clear repeal of federal jurisdiction. (4) Federalists committed to a strong national judiciary may also have preferred jurisdictional repeal as setting a less dangerous precedent than an amendment directing federal courts on how to decide cases on the merits. Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (suggesting constitutional limits on congressional power to dictate how Article III courts decide cases).

In answer to the second question, I would note that: (1) Shortly after the adoption of the Eleventh Amendment, proposals to repeal diversity jurisdiction were in fact made. See *infra* note 233. (2) Symbolically and ideologically, states' rightists found the prospect of a federal common law in diversity cases less offensive than federal common law liability of *the state itself*. (3) Politically, the highly charged issue of repayment of state Revolutionary War debts directly implicated the citizen-state diversity clauses but not the ordinary citizen-citizen diversity clause. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (Amendment animated by specific concern over war debt, rather than general theory of state sovereignty); Gibbons, *supra* note 179, at 1926-41. (4) Doctrinally, a federal common law in at least some citizen-citizen diversity cases was probably seen as less offensive to states' rightists than an analogous common law in citizen-state diversity cases like *Chisholm*. In *Chisholm*-type cases, the law of virtually every state was identical in immunizing the state from suit absent its consent. A federal common law rule of liability would therefore displace the policy of all the states. In the quintessential citizen-citizen diversity case, however, state law would predictably differ: Northern state laws would be pro-creditor; Southern laws, pro-debtor. In a typical diversity suit between a Northern creditor and a Southern debtor, a "neutral" federal common law rule "splitting the difference" between divergent state laws (each biased by parochialism) would be comparatively less threatening to states' rights, since not even a state law rule of decision would satisfy "sovereign" demands of all interested states. Blind federal court deference to the law of one state would necessarily be at the expense of the "states' rights" of the other state. Put another way, the justification for federal jurisdiction—and even a federal common law in some situations—was much stronger in citizen-citizen diversity cases where predictable state court parochialism at the choice of law stage might have exac-

jurisdictional repeal, however, was not designed as a barrier cutting across the other jurisdictional grants of Article III. The party alignments specified by the Eleventh Amendment would no longer provide an *independent basis* for jurisdiction (as they had in *Chisholm*), but the existence of such an alignment would not *oust* jurisdiction that was independently grounded—for example, in federal question or admiralty cases.<sup>203</sup>

### 1. *The Inadequacy of Current Doctrine*

If the Eleventh Amendment was meant to enshrine the general immunity of state “sovereigns” from private suits in federal courts, it was abysmally drafted. Not only does the text nowhere mention “state sovereign immunity,” but the limitations in the text itself are inexplicable if we assume (as does the Court) that the Amendment’s purpose was to secure general immunity.

The last fourteen words of the Amendment plainly restrict its scope to suits in which noncitizens are plaintiffs. Yet if, as the Court has held, the Amendment’s framers meant to bar federal jurisdiction over federal question suits brought by noncitizens,<sup>204</sup> why did the framers not also oust federal jurisdiction in analogous federal question suits brought by citizens, where the possibilities of state court prejudice were far smaller? It is hard to believe that the framers with one hand invoked federal power to protect out-of-staters with the diversity and privilege and immunity clauses while with the other hand seeking to discriminate against them with the Eleventh Amendment.<sup>205</sup> The Amendment’s limitation to cases “in law and equity” is also curious if the Amendment is read to embody a general principle of sovereign immunity. The three basic categories of cases familiar to the framers were law, equity, and admiralty.<sup>206</sup> If the states were to be immune in law and equity, why not in admiralty as well?

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erbad relations among states. See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 401–02 (1964). State court comity and reciprocity were far more likely in *Chisholm*-type cases where fewer conflicts among state laws would exist.

203. Professor Willie Fletcher and Judge John Gibbons have both recently published important articles that offer readings of the Eleventh Amendment similar to the one put forth here. See Fletcher, *supra* note 81; Gibbons, *supra* note 179; see also *Atascadero*, 473 U.S. at 258–90 (Brennan, J., dissenting) (following Fletcher-Gibbons approach to Eleventh Amendment). Although Professor Fletcher, Judge Gibbons, and I all reach similar conclusions about the Amendment’s meaning, we do so by way of somewhat different paths. While Professor Fletcher stresses the importance of federal court jurisdiction over cases involving federal statutes, and Judge Gibbons emphasizes the need for such jurisdiction in treaty cases, my main emphasis is on the third prong of “federal question” jurisdiction: cases arising under the Constitution itself. I also seek to locate the Eleventh Amendment in a more general structural framework of Federalist sovereignty theory, implicating federal as well as state sovereign immunity.

204. See, e.g., *Louisiana v. Jumel*, 107 U.S. 711 (1883).

205. See *infra* text accompanying note 236.

206. See 3 J. STORY, *supra* note 21, § 1683 (“[A] suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.”); Amar, *supra* note 9,

The Supreme Court has resolved the tension between comprehensive sovereign immunity and the textual restrictions of the Eleventh Amendment by finding immunity in cases where the Amendment by its own terms does not apply. In *Hans v. Louisiana*,<sup>207</sup> the Court held that federal jurisdiction was ousted where a citizen had sued his own state. *Hans* was a case arising under the federal Constitution—this time, the plaintiff had claimed that his state *was* violating the contracts clause—so federal jurisdiction was rooted in the “arising under” clause of Article III; nevertheless, the Court extended the sovereign immunity bar of the Eleventh Amendment to block the suit. Similarly, in *Ex parte New York*,<sup>208</sup> plaintiffs’ federal suit in admiralty was supported by an explicit grant of Article III jurisdiction—the “admiralty and maritime” clause—but jurisdiction was ousted by the Supreme Court’s extension of the Eleventh Amendment bar.

A coherent vision of blanket state sovereign immunity virtually compels the results in *Hans* and *Ex parte New York*; if noncitizen suits are barred in law and equity, there is simply no good reason *not* to extend sovereign immunity to citizen and admiralty suits. The problem, of course, is that the results in *Hans* and *Ex parte New York* contradict the unambiguous limitations of the Eleventh Amendment’s text—a contradiction that suggests the clear error of the Supreme Court’s first interpretive premise that the Amendment is in fact concerned with sovereign immunity. If coherence of general sovereign immunity doctrine is achieved only by mangling the Amendment’s text, the obvious lesson should be that the Amendment was not designed to embody any such doctrine.

Worse yet, *Hans* and *Ex parte New York* succeed in patching holes in the Court’s sovereign immunity theory only by tearing constitutional fabric in other spots. Even in some areas where Congress may constitutionally regulate state behavior, the Supreme Court denies it the power to provide for full enforcement of its regulations in federal court. By reading the Eleventh Amendment’s “state sovereign immunity” restrictions on federal *judicial* power to go far beyond the Tenth’s “residuary state sover-

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at 253.

207. 134 U.S. 1 (1890). Strictly speaking, it appears that the *Hans* Court rested its decision not on the Eleventh Amendment itself, but on general principles of state sovereign immunity tacitly limiting Article III. Subsequent opinions of the Court, however, have cited *Hans* as an Eleventh Amendment case, see, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), once again demonstrating the Court’s tendency to equate the Amendment with the very different principle of sovereign immunity. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Amendment’s “greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III”); *Ex parte New York*, 256 U.S. 490, 497 (1921) (“That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification.”).

208. 256 U.S. 490 (1921).

eignty" restrictions on federal *legislative* power, the Court has created a curious category of cases in which Congress may pass laws operating directly on states that can be enforced (if at all)<sup>209</sup> only in state courts.<sup>210</sup> The result is an inexplicable throwback to the jurisdictional regime of the Articles of Confederation, which the Federalists viewed as "extremely defective" and violative of obvious first principles of government.<sup>211</sup> "If there

209. The obligation of state courts to entertain all federal claims that federal courts are barred from hearing by the Court's sovereign immunity doctrine rests largely on the slender dicta of *General Oil Co. v. Crain*, 209 U.S. 211, 226-27 (1908). Cf. *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 293-98 (1973) (Marshall, J., concurring in result) ("The issue . . . is merely the susceptibility of the States to suit before federal tribunals."); *Atascadero*, 473 U.S. at 240 n.2 (structure of federalism determines which court will hear complaints against state, not whether they will be heard).

210. See, e.g., *Atascadero*, 473 U.S. 234; *Employees*, 411 U.S. 279.

211. See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 818-19 (1824) (Marshall, C.J.). It might be argued that Congress had no power under the original Constitution to legislate directly on states qua states. This argument, however, has properly been rejected by the Supreme Court. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *THE FEDERALIST* No. 36, at 220-21 (A. Hamilton) (federal government may continue to levy requisitions on state governments); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343 (1816) ("It is a mistake [to think] that the constitution was not designed to operate upon states, in their corporate capacities." (emphasis added)); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 464 (1793) (opinion of Wilson, J.) (similar). In any event, the basic point is simply that if and when Congress may constitutionally pass laws directly binding states, federal courts may not be barred from deciding all cases arising under these laws.

The Court has recently hinted in a footnote that state courts may be obliged to entertain suits that the Eleventh Amendment withholds from federal courts, and that these state court dispositions of federal questions can be reviewed on appeal by the Supreme Court. *Atascadero*, 473 U.S. at 238 n.2. This concession is inadequate and incoherent. It is inadequate because it still denies Congress power to use federal trial courts to enforce its own laws. The Court's position is exactly the one staked out by the extreme Anti-Federalist opponents of the Constitution, like Luther Martin, who argued that the national judiciary should only be allowed to exercise appellate review over state trial courts. Because the Federalists knew that state trial courts could not always be trusted to enforce federal rights, and that federal appellate review would not always suffice to protect these rights against state court hostility or indifference, they insisted—successfully—upon empowering Congress to establish federal trial courts that could entertain all federal cases. *Atascadero's* approach simply ignores the great Madisonian compromise at the base of Article III. See Amar, *supra* note 9, at 212-14, 233. The Court's concession is incoherent because it, in effect, forces state courts to hear certain suits—if there is no compulsion, the Court's point is meaningless—and then uses the state "consent" thus extorted to support federal appellate jurisdiction.

Just as the Federalists designed the federal judicial power to be coextensive with the legislative, they designed the original jurisdiction of lower federal courts to be potentially coextensive with the Supreme Court's appellate jurisdiction. *Atascadero* thus knocks out two of the basic pillars of Article III, both prominently featured in each of the three great Marshall Court opinions on federal jurisdiction: *Osborn*, 22 U.S. at 818-21; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384-99 (1821); *Martin*, 14 U.S. at 329-36.

Elsewhere in the same footnote, the Court serves up the following misstatements: "our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution"—nothing could be further from the truth, see *infra* text accompanying notes 235-36; "the Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government"—a statement that is profoundly true but equally irrelevant in a suit brought by a citizen claiming that a state has violated federal law; and "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself" (emphasis added)—a statement flatly contradicted by Madison in *THE FEDERALIST* No. 44, at 283-86 (noting framer's self-conscious choice to avoid word "expressly" in Constitution's "necessary

are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number."<sup>212</sup> The Federalist Constitution's provision that the federal judicial power under Article III would extend to *all* cases arising under laws passed under Article I could not have more plainly repudiated the Confederation's jurisdictional scheme.<sup>213</sup> And federal question suits brought against states themselves are exactly the sort of cases in which state courts are most likely to lack the commitment and political independence to enforce federal rights unflinchingly.<sup>214</sup>

The Federalist Constitution also guaranteed that federal jurisdiction would extend to all cases arising under the Constitution itself. Federal judges insulated from parochial politics were to play a special role in safeguarding various constitutionally guaranteed individual rights against state governments.<sup>215</sup> The Supreme Court's Eleventh Amendment jurisprudence mocks these solemn promises: Federal jurisdiction is barred even when citizens seek relief against states that have violated constitutional rights.

The Court itself has recognized the problems of following general sovereign immunity to its logical conclusion, and has therefore tried to limit that immunity through various doctrinal gymnastics and legal fictions. The most famous, the fiction of *Ex parte Young*,<sup>216</sup> allows citizens to sue for injunctive relief against a state violating the federal Constitution or

and proper" clause because of problems created by inclusion of word in Articles of Confederation, 1781, art. II), and the first Congress, see 1 ANNALS OF CONG. 790 (J. Gales ed. 1789) (objecting to attempt to insert "expressly" into Tenth Amendment), and Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (making same point about Tenth Amendment).

To top it all off, the Court cites—of all things—*Martin v. Hunter's Lessee* to support its vision of federalism. This citation does a disservice to the memory of Joseph Story, whose vision of federal jurisdiction simply could not be more distant. See Amar, *supra* note 9, at 210–15. Compare *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (citing *Martin* in support of proposition that state judges and federal judges are fungible) with *Martin*, 14 U.S. at 344–47 (explicitly denying such fungibility). The *Atascadero* footnote is emblematic of the Burger Court's sloppy use of history and misunderstanding (or deliberate perversion) of the Federalist tradition.

212. THE FEDERALIST No. 80, at 476 (A. Hamilton); see also Amar, *supra* note 9, at 250–52 (discussing axiom of coextensive jurisdiction); Fletcher, *supra* note 81, at 1074 (same).

213. It is, of course, possible to read the Eleventh Amendment as radically inconsistent with the provisions of the original Constitution—after all, the Amendment did modify the Philadelphia document. Nevertheless there are compelling reasons not to read the Amendment as a gross rupture of constitutional first principles. See *infra* text accompanying note 236.

214. As a logical matter, the gap between federal legislative and judicial power was created not by *Hans* itself but by reading the Amendment as a jurisdictional bar ousting federal question jurisdiction whenever there exists a certain party configuration. The roots of this mistake lie in a case, decided a few years before *Hans*, that raised a similar contracts clause issue, *Louisiana v. Jumel*, 107 U.S. 711 (1883). The *Jumel* suit, however, was brought by a non-Louisianian, and thus the Court held that federal question jurisdiction was ousted by the literal words of the Eleventh Amendment. As a practical matter, *Hans* is the more important case since it dramatically enlarges the jurisdictional hole created by *Jumel*; most federal question claims against states are claims against one's own state.

215. See Amar, *supra* note 9, at 222–29, 246–50; *supra* text accompanying notes 64–65.

216. 209 U.S. 123 (1908).

federal statutes by pretending to sue a state official. The *Young* fiction covers suits against officers in their official capacities—suits that can compel officers to pay money out of the state treasury, rather than their own pockets.<sup>217</sup> The fiction that such suits are merely brought against individuals, and not the state, is transparent. The “state” itself, after all, is an artificial juridical person and can act only through state officials. If these women and men are enjoined in their official capacities then, as a practical matter, the state is itself enjoined. Indeed, in cases like *Young* involving violations of constitutional rights, the cause of action itself typically requires the plaintiff to prove that defendant is a state actor wielding state power.<sup>218</sup>

If the fiction of *Ex parte Young* were fully extended to all citizen suits based on the constitutional wrongs of states, perhaps little harm would result from the Court’s interpretation of the Eleventh Amendment. “Sovereign” immunity would dissolve into a technical matter of writing one word instead of another in the caption of the complaint. Immunity would simply be a matter of pleading, of politeness.<sup>219</sup> In *Edelman v. Jordan*,<sup>220</sup> however, the Court cabined the *Young* fiction to suits for prospective relief. Federal courts may enjoin state officials in their official capacity to pay money out of the state treasury for future obligations, but may not order them to charge the public fisc to make whole victims of past constitutional wrongdoing. Perversely, a state government that spends money to avoid violating the Constitution ends up financially worse off than one that cynically flouts higher law until ordered into prospective compliance.

The obvious lack of principle underlying the *Edelman* distinction merely reflects a much deeper paradox in the Court’s attempt “to promote the supremacy of federal law [and yet] accommodate[] . . . the constitutional immunity of the States.”<sup>221</sup> The *Edelman* Court “declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States.”<sup>222</sup> But the Court has created its own false dilemma here by wrongly conceptualizing the “constitutional immunity of the States” as in tension with—indeed, as the logical negation of—the “supremacy of federal law.” The result would be comic were it not so tragic: The Court heroically

217. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

218. *Young* itself, for example, involved no individual private law tort by the defendant; the sole basis for the suit was the claim that defendant, as a state official, was about to execute an unconstitutional state law that offended the due process clause’s restrictions on state action.

219. Cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 460 (1793) (opinion of Wilson, J.) (King’s immunity from suit in Britain “is only in the form, not in the thing”).

220. 415 U.S. 651 (1974).

221. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

222. *Id.*

struggles to promote both higher-law limitations on states and the states' "immunity" to violate those limitations. It is no wonder the Court's Eleventh Amendment case law is incoherent; in law, as in logic, anything can be derived from a contradiction.<sup>223</sup> All we are left with is an *ad hoc* mish-mash of *Young* and *Edelman*, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness.<sup>224</sup> The icon of the federal courthouse open to remedy all constitutional wrongs gives way to a burlesque image of a doctrinal obstacle course on the courthouse steps.<sup>225</sup>

In the end, the Supreme Court's vision of state sovereign immunity warps the very notion of government under law. The Court's invocation of state "sovereign" immunity in cases where the state plainly is not sovereign—because it has acted *ultra vires*—resurrects the British theory of governmental supremacy that was anathema to the framers. It puts governments above, not under, the law. It makes government officers masters, not servants, of the People. James Madison put it bluntly: "[A]s far as the

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223. Further examples of incoherent doctrine: (1) The Eleventh Amendment is a subject matter bar that—unlike all others—may be waived (despite the fact that the Amendment nowhere suggests that "consent" can cure a jurisdictional defect) and—unlike other waivable bars (like personal jurisdiction, venue, and service of process)—may be raised at any time in the lawsuit. (2) When a state violates the Constitution or ordinary congressional legislation, it is immune from damages, but when it violates a court order it is not. Not only does this improperly give each state one free bite at constitutional rights, it seems to turn the Eleventh Amendment's special restriction on *judicial* power on its head. (3) The absence of a damage remedy encourages more intrusive and coercive injunctive relief, which, ironically, may be enforced by damages for noncompliance. (4) When Congress legislates under section 5 of the Fourteenth Amendment it can unilaterally lift state sovereign immunity, yet section 1 of that same Amendment apparently does not cure the jurisdictional defect, despite its self-executing nature. (5) Federal courts apparently cannot order specific performance of a state contract whose breach violates the contracts clause, but they can order specific performance of analogous obligations created by other federal law.

224. In *Pennhurst*, 465 U.S. 89, the Supreme Court further limited *Young* by declining to apply its fiction to a citizen suit seeking purely prospective relief on the basis of a state law claim pendent to the jurisdiction-conferring federal claim. Although *Pennhurst* might seem a dramatic extension of the Eleventh Amendment's jurisdictional bar, the case in fact can be read as returning to the core meaning of the Amendment: Where no higher law applies, where no federal question exists, federal courts should not have jurisdiction over private citizen suits against states. Although federal question jurisdiction did exist in *Pennhurst*, and therefore the Amendment by its terms did not strictly apply, the principles underlying it should perhaps inform the discretionary assertion of pendent jurisdiction over state-law claims. Cf. *Aldinger v. Howard*, 427 U.S. 1 (1976) (statutory limitation on federal jurisdiction should inform exercise of pendent jurisdiction).

But to reconceptualize *Pennhurst* in this way is to see yet again the flaw of *Edelman*. If the rationale for declining jurisdiction in *Pennhurst* is the absence of any federal right requiring vindication, the simple converse is that where such a federal right is asserted, jurisdiction should always be upheld—whether the relief sought is retrospective or prospective. The very same reasons that justified *Young* applied equally in *Edelman*: the need to provide full vindication of federal rights against states, vindication that will sometimes require retrospective damages. Perhaps unwittingly, *Pennhurst*'s analysis invites us to reorient the Eleventh Amendment's axis from the prospective-retrospective line of *Edelman* to the state law-federal law distinction involved in both *Pennhurst* and *Chisholm*.

225. See Fletcher, *supra* note 81, at 1044 (calling case law "jerry-built" and "complicated" by "use of fictions"); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 195, 197, 210–12 (1981) (noting that "curious rules" of Eleventh Amendment and "elaborate structure of fiction and artifice" force plaintiff to "negotiate . . . through judicial avoidance doctrines").



sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter."<sup>226</sup>

## 2. *The Advantages of Neo-Federalism*

The neo-Federalist reading of the Eleventh Amendment suffers from none of the crippling ailments of the Court's approach. To begin with, it makes perfect sense of all the words of the Amendment itself. The Amendment was limited to cases in "law and equity" precisely because its framers intended to leave plenary federal jurisdiction over "all cases of admiralty and maritime jurisdiction" undisturbed. It is quite implausible to assume—as the Court must—that the Amendment's omission of admiralty was a mere drafting oversight. In 1793, admiralty was universally considered to be one of the most important categories of federal jurisdiction.<sup>227</sup> Similarly, the Amendment was restricted to suits brought by noncitizen and foreign plaintiffs precisely because only the presence of these private plaintiffs would give rise to independent diverse party jurisdiction where a state was party defendant. The text does not speak sweepingly of state "sovereign immunity," but instead tracks the technical "judicial power shall extend" language of the Article III jurisdictional grants, precisely because it was simply designed to restrict two of those grants.

The Amendment's legislative history supports this parsing of the text. Professor Charles Warren uncovered an alternative amendment that he believed was introduced in the House of Representatives immediately after *Chisholm* came down, but never seriously considered.<sup>228</sup> Although other scholars have expressed doubt about whether the proposal was in fact ever officially introduced,<sup>229</sup> its undisputed existence confirms what should be obvious anyway: If the Eleventh Amendment's framers had intended a broad sovereign immunity principle applicable even in federal question cases, they knew the words:

[T]hat no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.<sup>230</sup>

226. THE FEDERALIST No. 45, at 289 (J. Madison); cf. T. JEFFERSON, *supra* note 102, at 164 ("[a]n elective despotism was not the government we fought for").

227. See Amar, *supra* note 9, at 253–54.

228. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922).

229. Gibbons, *supra* note 179, at 1926 n.186.

230. 1 C. WARREN, *supra* note 228, at 101.

By contrast, it would have been difficult to come up with wording that expressed better than does the Amendment's final text a simple desire to effect a partial repeal of two technical diverse party grants.

Even the Court has long argued that the Amendment was designed to parallel Justice Iredell's dissent in *Chisholm*.<sup>231</sup> Yet as noted above, Iredell carefully limited his rationale to diverse party cases; he expressly avoided a judgment (although he did venture admittedly tentative opinions) on the questions of state sovereign immunity in federal question or admiralty cases—questions not posed by *Chisholm* itself. The Court thus reads the Amendment to go far beyond Iredell's dissent in *Chisholm*, whereas the neo-Federalist reading follows Iredell by carefully limiting the scope of the Amendment to diverse party cases.<sup>232</sup>

A specific language change made by the drafters offers further evidence of their narrow intent. The original draft language of the Amendment provided that the judicial power "shall not extend" to noncitizen and foreign plaintiff suits against states in law and equity. That language, however, might have been interpreted to mean that the federal judicial power could never extend to cases presenting these party alignments, even when such cases were independently grounded in, say, a federal question. Perhaps because of this ambiguity, the original text failed to pass, and was subsequently modified by replacing the phrase "the judicial power shall not extend" with the language "the judicial power shall not *be construed* to extend." This modification softened the Amendment to conform to the framers' intent that the judicial power should not be construed to extend to the enumerated diverse party suits *as such*, but would extend to these diverse configurations whenever jurisdiction was independently based on another affirmative jurisdictional grant.<sup>233</sup>

231. *Hans v. Louisiana*, 134 U.S. 1, 12-19 (1890).

232. Interestingly, the "Constitution" of the Confederate States of America, which generally tracks the language of the Federalist Constitution, modified the language of Article III by adding the following italicized phrases: "The judicial power shall extend to . . . controversies . . . between a State and citizens of another State, *where the State is plaintiff*; . . . and between a State . . . and foreign states, citizens, or subjects; *but no State shall be sued by a citizen or subject of any foreign state.*" CONST. OF THE CONFEDERATE STATES OF AMERICA art. III, § 2 (1861) (emphasis added). Thus, the Confederates chose language that simply limited two party-defined jurisdictional categories without in any way establishing the general "sovereign immunity" of states, or ousting federal question and admiralty jurisdiction—exactly the same result as the Eleventh Amendment of the Federalist Constitution, properly read.

233. Senator Henry Clay proposed a constitutional amendment in 1807 in language that carefully tracked the Eleventh Amendment's: "The judicial power of the United States shall not be construed to extend to controversies between citizens of different States . . . nor between a State or the citizens thereof, and foreign States, citizens, or subjects." 16 ANNALS OF CONG. 76 (1807). The intent of this amendment was clear: The judicial power should no longer extend to the listed cases *ipso facto*, but it could where other sections of Article III so provided. *See id.* at 216 (remarks of James Elliot). Under Clay's amendment, mere diversity of citizenship was obviously not intended to oust independently granted (federal question or admiralty) jurisdiction. So too with the Eleventh Amendment.

Some scholars have conjectured that the words "shall not be construed" were inserted into the

The "shall not be construed" clause of the Eleventh Amendment thus harmonizes with the identical language in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Here, the enumeration of rights does not automatically deny, repeal, or abrogate other natural rights. Those rights may continue to be judicially enforced in the absence of contrary superior positive law—congressional or constitutional. Similarly, in the Eleventh Amendment, the judicial power does not automatically extend to enumerated suits, but suits may lie if provided for by positive law—congressional or constitutional.<sup>234</sup>

Finally, the neo-Federalist reading preserves various basic structural principles of the original Constitution repudiated by the Court's doctrine—the coextensiveness of judicial and legislative power; the coextensiveness of original and appellate jurisdiction; the critical importance of plenary federal jurisdiction in admiralty and federal question cases; the structural superiority of the federal judiciary to state judiciaries; the special role of federal judges in protecting individual rights against states; and the need for suits against states themselves to enforce these rights. I have

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Eleventh Amendment to correct what the Amendment's framers regarded as the Supreme Court's misconstruction of the original diverse party grants in *Chisholm*. The language of Clay's amendment, however, belies this hypothesis. In 1807, it was clear that Article III did extend federal jurisdiction to cases between individuals with diverse citizenship. Clay evidently inserted the "shall not be construed" clause to make clear that his amendment was simply repealing an earlier affirmative jurisdictional grant, not creating a new jurisdictional bar. The same clause was designed to serve the same purpose in the Eleventh Amendment.

The "misconstruction" thesis also seems at odds with the abundant evidence suggesting that, on the jurisdictional issue proper, *Chisholm* was firmly grounded. See *supra* text accompanying notes 173–83.

234. It thus turns out that a proper reading of the Eleventh Amendment can help to inform interpretation of the Ninth, which has itself been the subject of much confusion. (The neo-Federalist reading thus clarifies important connections, currently obscured by Supreme Court doctrine, among the Ninth, Tenth, and Eleventh Amendments.) Under the interpretation offered here, the "natural" or pre-existing rights "retained" by the People and declared by the judges would be "subconstitutional" in that they could be trumped by legislative enactment. The Ninth Amendment authorizes federal judges to engage in the making of a species of what Professor Monaghan has labelled "constitutional common law"; judicial derivation of natural law is both approved and democratically cabined. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). This reading of the Ninth Amendment is buttressed by recent work on the history of natural law in America. According to Professor Robert Cover, Americans in the 18th and 19th centuries generally viewed judicially derived natural law as interstitial law that could be overridden by legislative enactment. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 34 (1975).

This interpretation of the Ninth Amendment may help to resolve two seemingly unconnected problems currently bedeviling constitutional scholars. First, what is the constitutional source of constitutional common law? Professor Monaghan's efforts to answer this question seem uncharacteristically weak. See Monaghan, *supra*, at 8, 13, 23, 34–38; see also Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118–45 (1978) (criticizing Monaghan on this point). Second, how can the Ninth Amendment be taken seriously yet limited? Interestingly, in Dean Ely's exhaustive Sherlock Holmesian proof-by-elimination concerning the meaning of the Ninth Amendment, the one possibility he overlooks is constitutional common law. J. ELY, *DEMOCRACY AND DISTRUST* 34–41 (1980).

discussed the first five of these principles at length elsewhere.<sup>235</sup> I shall therefore simply note here that if the Supreme Court's interpretation is correct, it is amazing that the Amendment was supported by so many Federalists—without whose support the Amendment could not have succeeded—willing to dismantle so much of what they had worked so hard so recently to erect.<sup>236</sup> The sixth and final structural principle—the remedial imperative of government liability—requires additional elaboration and furnishes perhaps the strongest reason of all for rejecting the Court's Eleventh Amendment doctrine.

### C. *The Remedial Imperative of Government Liability*

To say that the Eleventh Amendment embodies no general principle of state sovereign immunity is only to begin constitutional inquiry. Even in the absence of a specific textual niche for sovereign immunity, we must examine the structure of the Constitution to see whether such immunity is implicit in our constitutional order. For example, there is no obvious source of national sovereign immunity analogous to the Eleventh Amendment, yet countless suits against the federal government have been barred by general sovereign immunity principles of mysterious origin. Indeed, much of the case law of federal sovereign immunity has been directly assimilated, with little explicit analysis or justification, to state sovereign immunity cases—an assimilation that once again suggests that the real workhorse in sovereign immunity doctrine is not the text of the Eleventh Amendment. Assuming that no Eleventh Amendment sovereign immunity exists, the question becomes, does the rest of the Constitution imply governmental immunity?<sup>237</sup>

In *Monaco v. Mississippi* the Court wrote:

Manifestly, we cannot . . . assume that the letter of the Eleventh

235. See Amar, *supra* note 9. In that essay, I attempted to establish that the Federalists viewed the first three jurisdictional categories of Article III—which include the admiralty and federal question grants—as far more important than the last six diverse party categories. While the Court reads the Eleventh Amendment to cut deeply into the first three “critical” categories, the neo-Federalist reading reinforces the two-tiered approach to Article III by viewing the Amendment as merely trimming off portions of “second tier” categories that were much less important from the outset.

236. “The roster of those favoring the amendment includes the names of ardent nationalists, as well as states’ rights men.” C. JACOBS, *supra* note 173, at 71. “That there was no design, on the part of its framers, to effect a revolution in federal-state relations seems clear.” *Id.* at 92.

237. Put another way, do strong reasons exist to try to cram sovereign immunity into the Eleventh Amendment despite the obviously uncomfortable fit? Cf. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 806-07 (tent. ed. 1958) (Court has abandoned words of Eleventh Amendment and treated it “as if it were a precedent to the opposite of *Chisholm v. Georgia*”). Unfortunately, the Court has misread the anti-*Chisholm* precedent of the Eleventh Amendment by going far beyond the “holding” of Iredell’s dissent. See *supra* text accompanying note 231. In effect, the Court has read the Eleventh Amendment as if it were a precedent to the opposite of the rest of the Constitution. See *infra* text accompanying notes 240-60.

Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."<sup>238</sup>

But contrary to *Monaco* and the rest of the Court's sovereign immunity case law,<sup>239</sup> the Constitution draws its life from postulates that limit and control lawless governments, not postulates that limit and control citizens in their efforts to vindicate constitutional rights, nor postulates that limit and control federal courts in their efforts to provide that vindication. The real postulates "behind the words of the constitutional provisions" are these: (1) Ultimate sovereignty resides in the People of the United States, not in governments. Governments—state and national—enjoy only limited and delegated sovereign power. When these governments violate the commands of the highest Sovereign embodied in the Constitution, they are no longer acting in their derivative sovereign capacity, and thus have no "sovereign" immunity. (2) The legal rights against governments enshrined in the Constitution strongly imply corresponding governmental obligations to ensure full redress whenever those rights are violated. (3) Full and adequate remedies for constitutional wrongs committed by governments will often call for governmental liability. In these cases, there necessarily has been—to reclaim the words *Monaco* borrowed from Hamilton—"a surrender of immunity in the plan of the convention [i.e., the Constitution]."

The first postulate simply distills the theory of popular sovereignty animating the Federalist Constitution.<sup>240</sup> The second is equally straightforward. Few propositions of law are as basic today—and were as basic and

238. 292 U.S. 313, 322-23 (1934) (footnote omitted) (quoting THE FEDERALIST No. 81 (A. Hamilton)).

239. Despite the plain words of Article III, *Monaco* held that no federal jurisdiction existed over a suit brought by a foreign nation against an unconsenting state. *Id.* at 320-32. Unless state courts are forced to hear such cases—a compulsion that seems at least equally, if not more, offensive to state "sovereignty"—needless international confrontations might arise embroiling citizens in all the other states of the union. It was exactly to avoid such international incidents that the Federalists gave national tribunals the power to entertain "Controversies . . . between a State . . . and foreign States." U.S. CONST. art. III, § 2; see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 424 (1793) (oral argument of Randolph); *id.* at 451 (opinion of Blair, J.); *id.* at 467 (opinion of Cushing, J.); *id.* at 473 (opinion of Jay, C.J.). Nothing in the Eleventh Amendment in any way alters this jurisdictional grant, as Chief Justice Marshall forcefully noted in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821). The parochialism of *Monaco* is staggering; nowhere else has the Court applied state sovereign immunity principles outside the context of a private citizen's suit against a state. See *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (upholding jurisdiction when state plaintiff sues unconsenting state defendant on virtually identical cause of action to that ousted in *Monaco*); *United States v. Texas*, 143 U.S. 621 (1892) (upholding jurisdiction where U.S. is plaintiff).

240. See *supra* text accompanying notes 56-170.

universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy. The proposition that every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions;<sup>241</sup> was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality;<sup>242</sup> and was the cornerstone of analysis in one of the most important and inspiring passages of *Marbury v. Madison*:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .

. . . “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded”. . . . “[E]very right, when withheld, must have a remedy, and every injury its proper redress.”

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.<sup>243</sup>

The third step of analysis focuses on how the very existence of sovereign immunity will often drive a wedge between legal right and effective remedy. Granted, not all may have recognized this fact at the time of the adoption of the federal Constitution. Iredell in *Chisholm* closed his opinion with the self-described dictum that “every word in the Constitution may have its full effect without involving [the] consequence” of allowing “a compulsive suit against a state for the recovery of money.”<sup>244</sup> Similarly, John Marshall’s opinion in *Cohens v. Virginia* seemed to imply that full vindication of constitutional rights against states might not require affirmative suits against the state; individual rights, Marshall hinted, might be fully protected by affirmative suits against individual officers in their private capacity, and by the ability of citizens to invoke constitutional rights defensively in suits brought by states.<sup>245</sup>

Even if these arguments were colorable in the eighteenth and early

241. See Gibbons, *supra* note 179, at 1898 n.44 (citing constitutions of Delaware, Maryland, and Massachusetts); see also 3 J. ELLIOT, *supra* note 52, at 658 (Declaration of Rights and Amendments of Virginia ratifying convention).

242. “But a right implies a remedy . . . .” THE FEDERALIST No. 43, at 274 (J. Madison).

243. 5 U.S. (1 Cranch.) 137, 162–63 (1803) (quoting 3 W. BLACKSTONE, *supra* note 27, at \*23, \*109).

244. 2 U.S. (2 Dall.) 419, 449–50 (1793).

245. 19 U.S. (6 Wheat.) 264, 402–03 (1821).

nineteenth centuries,<sup>246</sup> they fail today. To begin with, in the eyes of Ireland and Marshall any possible government immunity was offset by strict liability on the part of individual government officers. For example, in *Osborn v. Bank of the United States*, Marshall noted that the defendant Ohio officer would have been personally liable to the plaintiff bank even had he acted in compliance with a state law that he reasonably but incorrectly believed to be fully constitutional.<sup>247</sup> Today, most individual government officers enjoy either qualified or absolute immunity from personal liability. As Professor Engdahl has noted, courts since the mid-nineteenth century have opened up a wide remedial gap by creating expansive official immunities without correspondingly relaxing government immunity.<sup>248</sup>

Even abolition of the current structure of individual immunity would often only narrow twentieth century gaps between right and remedy.<sup>249</sup> Individual officers will frequently be (at least partially) judgment-proof. Pervasive and systematic illegality will not always be traceable to specific individuals who can be called to account. The state entity itself will often

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246. They did not represent the dominant view of the Federalists. See *infra* text accompanying notes 253-55. Yet even if I am wrong on that count, the error is not fatal to my structural argument here. Rather, we would be left with the following puzzle: The framers of the Constitution believed (1) that there should be full remedies for violations of constitutional rights, and (2) that such remedies would never require government liability. If (1) and (2) are inconsistent today because of changed circumstances, the question becomes, which should yield? The issue here is admittedly devilish, but a sensitive reading of the Constitution suggests that (2) should yield because full remedies were woven into the fabric of the document in a way that government immunity was not. See *infra* text accompanying notes 256-60. The Constitution is better read as in effect imposing the risk of changed circumstance on lawless governments and not constitutional rights-holders.

To take a similar example, the framers believed both that Congress should have power to legislate upon all truly interstate commerce, and that such legislation would never seriously intrude on state legislatures, since most commerce was purely intrastate. Because of changed circumstances, these propositions are inconsistent today. Transportation and communications technologies have vastly increased the proportion of truly interstate commerce. Once again, the issue is tricky, but a sensitive reading of the Constitution suggests that the prerogatives of state legislatures should yield, because the coterminous nature of congressional power and interstate commerce was built into the Constitution itself. If interstate commerce expands, so does congressional power under the commerce clause. The Constitution imposes the risk that changed technological circumstances might expand the national economy upon state legislatures.

247. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 839 (1824) ("The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admit the liability of the defendants to the plaintiffs . . ."); see also *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (obedience to presidential orders does not immunize naval officer from liability for unlawful seizure); *Marbury v. Madison*, 5 U.S. (1 Cranch) 170 (1803) (office does not create immunity from accountability for illegal acts).

248. Engdahl, *Positive Immunity and Accountability for Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); accord P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1410-23 (2d ed. 1973); Dellinger, *supra* note 13, at 1553-59; Gibbons, *supra* note 179, at 1943 n.295; see also Declaration and Resolves of the First Continental Congress, *supra* note 76, at 84 (objecting to parliamentary attempt to immunize errant government officials from private damage suits).

249. Cf. P. SCHUCK, *STUNG GOVERNMENT* 55-121 (1983) (strict individual liability without indemnification may create perverse incentives and compound already excessive risk aversion of government officials).

be the source and the unjustly enriched beneficiary of illegal conduct by individual officials. Furthermore, general principles of modern tort theory and enterprise liability suggest that the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights. Thus, many of the same reasons that support entity liability for private corporations argue persuasively for similar entity liability for governments<sup>250</sup>—a point sharpened by the Federalists' conception of governments as limited corporations, and by their use of agency principles and incentive analysis as linking concepts in a more general system of political economy structuring the law of both governmental and profit-seeking organizations.<sup>251</sup>

Additionally, many legal rights today are affirmative rights against the government itself. If the Constitution obliges a state to provide minimal education to its children,<sup>252</sup> this affirmative right cannot be fully protected by the ability of a citizen to raise her claim defensively in a state-initiated proceeding. Likewise, this right cannot be adequately protected by the possibility of suit against a private person, since the obligation is that of the state qua state.

Furthermore, Iredell's and Marshall's musings notwithstanding, the dominant view of the Federalists was that full vindication of constitutional rights would sometimes require direct suit against government. Even in the absence of today's more expansive vision of affirmative rights, the framers recognized that affirmative relief would often be essential to protect negative rights<sup>253</sup>—especially where the government violation could not be prevented *ex ante*, and where the government would enjoy the fruits of its past violations. In the words of Attorney General Edmund Randolph, who had earlier played a vital role in the Philadelphia Convention and the Virginia ratification debates:

The common law has established a principle, that no prohibitory act shall be without its vindicatory quality . . . . In our solicitude for a

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250. See generally *id.*

251. See *supra* text accompanying notes 31–49, 72–75. Judge Gibbons has noted that no state constitution explicitly provided for sovereign immunity, and that, on the contrary, the charters of several states expressly provided that the state could be sued, in conformity with the general rule that corporations were suable. See Gibbons, *supra* note 179, at 1896–98.

252. The Supreme Court has expressed doubt about the existence of this right to minimal education and invoked principles of “federalism” in support of its view. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). Nevertheless, I use an education hypothetical because I believe *Rodriguez* was as misguided as the Burger Court’s Eleventh Amendment cases analyzed above, raising a serious question whether the Court’s general misuse of “federalism” and “state sovereignty” to constrict constitutional remedies is paralleled by a general misuse of these principles to constrict constitutional rights. The question lies beyond the scope of this essay, but I hope to present the reasons behind my admittedly conclusory statement here about *Rodriguez* in a subsequent essay on the Civil War Amendments and the meaning of freedom.

253. For a modern explication of this vision, see Dellinger, *supra* note 13.



remedy, we meet with no difficulty, where the conduct of a state can be animadverted on through the medium of an individual. . . . But this redress goes only half way; as some of the preceeding unconstitutional actions must pass without censure, unless states can be made defendants. What is to be done, if, in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What, if a state should impair her own contracts? *These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the State.*<sup>254</sup>

Chief Justice Marshall's own opinion for the Court in *Marbury* also cut strongly against a broad view of sovereign immunity. Following the logic of *ubi jus, ibi remedium*, he expressly declared the appropriateness of mandamus—affirmative judicial relief against an executive officer in his official capacity—to fully protect a vested legal right. Marshall quickly dismissed the notion that a defendant government official could enjoy any British-style “sovereign immunity” from a suit charging a violation of vested rights.<sup>255</sup> At one level, then, *Marbury*'s logic could be described as follows: If the only full and adequate remedy for ultra vires action by government requires a pro tanto abrogation of sovereign immunity, so be it.

It therefore seems evident that at least in some cases, blanket government immunity from liability conflicts with the Constitution's structural principle of full remedies for violations of legal rights against government. What, then, can possibly justify the invocation of sovereign immunity in those cases? Surely not the text of the Constitution, for we have already seen that governmental claims to sovereign immunity have no textual basis.<sup>256</sup> Nor can it be persuasively argued that the structural principle of full remedies is somehow necessarily qualified or limited by an equally

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254. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 422 (1793) (oral argument) (emphasis added). Note how Randolph's first sentence invokes the remedial imperative. Moments earlier, he had argued that the Constitution imposed legal limits on the powers of government. *Id.* at 421–22; *cf. id.* at 423 (Constitution derives from People). Indeed, the overall structure of his oral argument precisely parallels the three-step structure of my argument in this section.

255. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 164–66, 170–71 (1803).

256. See *supra* notes 201–36 and accompanying text. Absent such a clear statement from the People themselves in the Constitution, we should strain against reading the document as containing partially hollow promises. Yet even without a principle of interpretive generosity directing us to read the Constitution as “the best it can be,” see R. DWORKIN, *LAW'S EMPIRE* (1986), the document and its background structure of late eighteenth-century American jurisprudence offer little support to modern-day Legal Realists who attempt to tailor rights to fit remedies rather than vice versa. See generally Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986) (critiquing legal realist understanding of rights and remedies).

valid structural postulate of absolute government immunity from all suits. The latter principle is simply not part of our Constitution's structure. Its sole basis is the British idea that the sovereign government, as the source of all law, cannot itself be bound by any law absent its consent.<sup>257</sup> As we have seen, literally every article of the Federalist Constitution and every amendment in the Bill of Rights rests on the repudiation of the British view.<sup>258</sup> Thus, to accept the plenary sovereign immunity of governments as a structural principle is necessarily to reject the first postulate of popular sovereignty.<sup>259</sup> Put another way, to try to straddle the inconsistent principles of effective remedy and sovereign immunity is to fall into the logical contradiction at the center of the Court's Eleventh Amendment jurisprudence.<sup>260</sup>

It must be emphasized that the structural argument outlined here does not eliminate all "sovereign immunity." It does not make governments suable for anything and everything, as the Court's free-wheeling approach in *Chisholm* threatened to do. A defining feature of a government is that it operates under legal rules that substantially differ from those applicable to private citizens. What would be obviously tortious for a private citizen is often standard operating procedure for a government—taxation, for example. Thus so long as governments act within the scope of their delegated authority, they may choose to exercise their sovereign power by immunizing themselves from rules that apply to private citizens. On this count, *Chisholm* was wrongly decided and rightly repudiated. When governments act ultra vires and transgress the boundaries of their charter, however, their sovereign power to immunize themselves is strictly limited by the remedial imperative.<sup>261</sup> A government may immunize itself, even for

257. It might also be argued that because government entities have no authority to violate constitutional norms, responsibility for violations cannot be attributed to these entities, but rests solely with individual government officials. Under this fiction, *government* can by definition "do no wrong"; thus, if a wrong has occurred, "government" did not do it—even if government policy allowed or even prescribed the individual wrongdoing. This fiction has properly been rejected by the Court at the rights-violation stage, see *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), and therefore has no legitimate place in constricting remedies. The fiction has also been rejected in private corporation law: A corporation may be liable for the torts of its agents even if their actions were ultra vires—a point that the Supreme Court has noted in the sovereign immunity context while utterly misunderstanding its implication for government corporate liability. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693–95 (1949); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 113 n.24 (1984) (citing 10 W. FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4877, at 350 (rev. ed. 1978)).

258. See *supra* text accompanying notes 56–170.

259. See *supra* text accompanying note 240.

260. See *supra* text accompanying notes 216–25.

261. Thus, the *Chisholm* Court erred in concluding that because state governments were not fully sovereign in every respect, they could *never* immunize themselves from liability. Today's Court commits an equal and opposite error in concluding that because state governments are "sovereign" in some limited and derivative respects, they can *always* immunize themselves from liability. The proper analysis is more discriminating. Where governments are acting within the bounds of their delegated

ultra vires acts, but only if other remedies—for example, strict liability suits against non-judgment-proof individual officers—can guarantee victims full redress.<sup>262</sup>

If we seek textual confirmation of this structural analysis, we need look no further than the Tenth Amendment. This should not be surprising, for once we have stripped away the Court-fashioned encrustations obscuring the true meaning of the Eleventh Amendment, the Tenth becomes a far more logical place to search for the theory of sovereignty embodied in the Constitution. Indeed, no other provision of the Constitution focuses so clearly on the triangular interrelations among the national government, the state governments, and the People themselves: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As we have already seen, the final clauses of this Amendment confirm the ultimate sovereignty of a unitary American People.<sup>263</sup> Consistent with that sovereignty, the Amendment betrays an obvious concern with keeping all governmental power strictly within the limits of the People's delegations. The national government is not to exercise "powers not delegated to [it] by the Constitution;" and states are not to exercise any powers "prohibited" by the Constitution, "delegated" to national agents, or "reserved

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"sovereign" power, they may partake of sovereign immunity; where not, not. See Dellinger, *supra* note 13, at 1557.

262. See Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366-70 (1953) (noting congressional power to choose among full and adequate remedies); *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 397 (1971) (similar). A slightly different way to conceptualize the matter is to see the government as a nondelegable surety for the misdeeds of its officials. Like other sureties, or corporations liable under respondeat superior, a government may have an independent claim against individual wrongdoers when their wrongdoing results in entity/surety liability. See Dellinger, *supra* note 13, at 1553-59.

It might be asked why the Constitution should be read to require full remedies for constitutional violations—after all, remedies for violations of legal rights are often qualified in various ways, e.g., through statutes of limitation. This question, however, ignores the fundamental difference between constitutional wrongs and other legal violations. See *Butz v. Economou*, 438 U.S. 478 (1978). Unlike other legal rights created and subject to qualification, modification, and limitation by government, constitutional rights derive from a higher source than government itself. Their very purpose is to keep government honest. Thus, absent a clear statement by the People in the Constitution itself, the document should not be read to create gaps between right and remedy manipulable by government. This argument harmonizes with the general rule for constitutional rights disfavoring denials of relief absent a knowing and intelligent waiver of these rights. See, e.g., *Henry v. Mississippi*, 379 U.S. 443 (1965).

Similarly, any argument that governments simply cannot afford to offer full remedies for constitutional violations rings hollow given that governments spend so much to pay other expenses—including liability judgments in nonconstitutional tort cases pursuant to statutory waivers of sovereign immunity—not mandated by constitutional norms. If government's resources are finite, these discretionary expenditures surely must take a back seat to payments mandated by constitutional principles; any other system smacks of impermissible discrimination against constitutional rights. To argue that governments "cannot afford" to guarantee full remedies is to argue that the regime of rights that the framers embedded in the Constitution is simply unworkable. This is an argument that should be required to bear a very heavy burden of proof.

263. See *supra* text accompanying notes 131-33.

... to the people" through state constitutions.<sup>264</sup> Strictly speaking, the Tenth Amendment affirms the sovereignty of the People, not the sovereignty of state governments: It resoundingly affirms the structural conclusion that governments have no sovereignty to violate the Constitution and get away with it.

In fact, the Amendment can be seen as containing a tantalizing suggestion that the very division of delegated sovereign powers between two different sets of agents can promote the ultimate sovereignty of the People. In particular, the Amendment hints that the reservation of limited law-making "powers . . . to the States respectively" is somehow connected to preventing the federal government from exercising "powers not delegated to" it. Limited state governments can help maintain limits on the national government. It is now time to explore that hint in greater detail.

### III. A NEO-FEDERALIST VIEW OF FEDERALISM

Analysis of the power of each government, state and national, to "check" unconstitutional conduct by the other follows naturally from analysis of government liability for constitutional wrongs: Both concepts stem from the framers' more general principles of popular sovereignty and limited government. Just as the sovereign immunity issue turns on a proper understanding of the revolutionary debate, so the issue of inter-governmental relations is framed by the Civil War debate. Whereas the Court's sovereign immunity doctrine misapplies the lesson of the Revolution, contemporary constitutional scholarship tends to misunderstand certain federalism issues because it misreads the message of the Civil War. By interpreting the War as establishing the supremacy of the national government, instead of the national People, contemporary scholarship has overlooked the myriad ways in which states may usefully and permissibly check federal lawlessness. Fittingly, each set of structural and historical misunderstandings has a textual complement: The Court overreads the Eleventh Amendment as enshrining state sovereign immunity, and contemporary scholars tend to overread the supremacy clause as embodying the supremacy of the federal government instead of the supremacy of "We the People" through the Constitution.

The basic proposition here is simple: Constitutional federalism is a two-edged sword for constitutional justice. Under this view of federalism, each constitutionally limited government can deploy its powers to police the constitutional limits on the other's powers and remedy the other's consti-

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264. See 3 J. STORY, *supra* note 21, § 1900 (state constitutions mark Tenth Amendment boundary between those nonnational powers "reserved to the States respectively" and those powers reserved "to the people").

tutional violations. In contrast to the Court's doctrine of sovereign immunity, we need to see how the limited sovereignty of state and federal governments promotes and vindicates the ultimate sovereignty of the People.

#### A. *The Riddle of The Federalist*

Let us begin by considering again Madison's *The Federalist* No. 51, in which he suggests that federalism and separation of powers work in similar ways:

[T]hose who administer each department [must have] the necessary constitutional means and personal motives to resist encroachments of the others.

. . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. . . .

. . . In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>265</sup>

Madison's point here is crisper than the cliché that diffusion of political power will generally prevent tyranny. He implies that the Constitution's structure of government will help assure compliance with the specific *legal rights* established by that instrument. He speaks of "the *rights* of the people" and the structural incentives that "control" against governmental "encroachments."<sup>266</sup>

Madison's analogy between separation of powers and federalism invites careful attention. For separation of powers plainly has a legal as well as a political dimension; it establishes structures and institutions—like judicial review—whose very purpose is to assure government compliance with the specific legal rights embodied in the Constitution. The question thus be-

265. THE FEDERALIST No. 51, at 321–23 (J. Madison).

266. His language in *The Federalist* No. 48 is to similar effect:

[P]ower is of an *encroaching* nature and . . . ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in *theory*, the several classes of power, . . . the next and most difficult task is to provide some practical security for each, against the invasion of the others. . . . [I]t is not sufficient to mark, with precision, the *boundaries of these departments in the constitution* of the government, and to trust to *these parchment barriers* against the *encroaching* spirit of power. . . . [T]he powers of government should be so divided and balanced among several bodies of magistracy as that no one could *transcend their legal limits* without being effectually checked and restrained by the others.

THE FEDERALIST No. 48, at 308–11 (J. Madison) (emphasis added).

comes, what similar structural features vindicating constitutional rights animate federalism?

The key words of *The Federalist* that can help us unlock this riddle appear in a seldom-quoted passage of Hamilton's No. 28:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*<sup>267</sup>

Hamilton's point here, like Madison's in *The Federalist* No. 51, is not simply that a federal system is a good thing because it diffuses power, but the more precise and intriguing claim that federalism will serve to "check" "usurpations" and "redress" invasions of "the people's" legal "rights." We should note the symmetry of Hamilton's language here; like Madison, he speaks of each government checking the lawlessness of the other. We should also note the richness of Hamilton's imagery. He weaves together language of checks and balances (the word "check" is followed by a balancing image of the people "throwing themselves into either scale");<sup>268</sup> of military might (each government "will at all times stand ready" to thwart the others' attempts to "invade[]" the rights of citizens); of political competition/agency incentive analysis (governments are "rivals" with competing "dispositions"; the People are their "masters");<sup>269</sup> and technical legal doctrine ("rights" and "redress" are paired). To understand fully the Federalists' vision of federalism, we must understand how all these images were interrelated. In particular, we must see how federalism was designed to check and balance at least three types of interpenetrating power: military, political, and legal. The Federalists were quite clear-eyed in recognizing that a system that distributed these three

267. THE FEDERALIST No. 28, at 180-81 (A. Hamilton) (emphasis added). Earlier Hamilton defined "confederacy" to include any system—even one predicated on the sovereignty of one People—retaining both local and central government entities. *Id.* No. 9, at 75-76. As Professor Diamond has shown, such a linguistic coup deviated from earlier definitions of confederacy. See Diamond, *The Federalists' View of Federalism*, *supra* note 83, at 23-33; see also *supra* notes 9, 134 (discussing other Federalist linguistic coups).

268. For further images of checks and balances, see THE FEDERALIST No. 9, at 72 (A. Hamilton).

269. Although Hamilton's precise language is that the People are "masters of their own fate" and not "masters of their competing agents," a double entendre seems intended. *Cf. id.* No. 46, at 294 (J. Madison) (federal and state governments are "different agents and trustees of the people," "mutual rivals" controlled by a "common superior").

types of power in radically divergent ways would be unstable in the long run.<sup>270</sup> It is thus no coincidence that Hamilton's final three words in this passage, describing each government as a potential "instrument of redress," are words that work well on all three levels—military, political, and legal. Nor is it purely coincidental that on each of these levels, there are powerful analogies between separation of powers and federalism, the two great structural principles of the Constitution. For in separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other's powers.<sup>271</sup>

### B. *Military Checks and Balances*

The Constitution dramatically expanded the central government's military powers. Under the Articles, Congress could raise troops only by "requisitioning" each state for its proportionate "quota" of men (determined by white population). Each state legislature retained the power to "raise, . . . cloath, arm and equip" its troops, and to appoint all regimental officers "of or under the rank of colonel."<sup>272</sup> To raise the funds to pay for these men and materiel, Congress once again had to rely on state governmental compliance with a quota system (this time based on wealth). The unworkability of this requisition system—no mechanism short of war existed to enforce states' obligations, so they quite predictably flouted them<sup>273</sup>—led the Federalists to empower the new national government to directly raise its own army, to directly tax individuals to pay for that army, and to appoint all its officers. In addition, the new Constitution broke with the Articles by authorizing the new central government to nationalize state militias "to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>274</sup>

The very awesomeness of these military powers induced the Federalists to balance power more carefully *within* the national government. In England, the King theoretically had the power both to declare war and to command troops.<sup>275</sup> Under the Articles, both of these powers resided, at least on paper, in a single unicameral assembly, Congress. By contrast, the Constitution split these powers between legislature and executive. The

270. See, e.g., *id.* Nos. 8, 23–29, (A. Hamilton); *id.* Nos. 41, 43, 48, 51 (J. Madison).

271. See, e.g., *id.* Nos. 17, 26, 28, 66, 72, 84 (A. Hamilton); *id.* No. 51 (J. Madison).

272. Articles of Confederation, 1781, art. IX, para. 5; *id.* art. VII.

273. For accounts of the free riding and race to the bottom created by congressional impotence, see THE FEDERALIST No. 22 (A. Hamilton); J. MADISON, *supra* note 59.

274. U.S. CONST. art. I, § 8, paras. 12–15.

275. See THE FEDERALIST No. 69, at 417–18 (A. Hamilton).

former could declare war, but the latter would serve as commander-in-chief. Similarly, Congress could lay down "rules for the government and regulation" of military forces, but the President would execute these rules; Congress could authorize military appropriations (for up to two years), but the President would superintend actual military disbursements; Congress could provide rules for nationalizing state militias, but the President would command them whenever they were called into service.<sup>276</sup>

The Federalists struck a similar, though today less noted, vertical balance of military power. For despite the vastly increased practical power of the central government—including the power to quell local insurrections—states still retained one vital check. Although they were forbidden to keep any professional "Troops . . . in time of Peace without Congressional consent," they were expressly charged with the "Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress."<sup>277</sup> These militias were ultimately subject to nationalization in times of emergency, but their loyalties were likely to be local. State governments would train these men, equip them, and appoint their officers. If the national government had ultimate "title" to these men and arms, state governments had "possession"—and the Revolutionary War experience had shown that possession was no small thing. In the event that the central authorities tried to use a national standing army to suspend the Constitution and forcibly subjugate the People—a spectre made vivid by contemporary historical accounts of Stuart tyranny in England, and the birth of despotism in other countries<sup>278</sup>—the various state militias could serve as organized and independent pockets of military resistance.

In a single [nonfederal] State, if the persons entrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumult-

276. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("[The President] has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.").

277. U.S. CONST. art. I, § 10, para. 3; *id.* § 8, para. 15; see 1 M. Farrand, *supra* note 40, at 172 (remarks of Elbridge Gerry).

278. See B. BAILYN, *supra* note 20, at 55–159. One additional point must be kept in mind: In 1787, it was taken for granted that George Washington—a general—would be selected as the first President under the Constitution (assuming Virginia's ratification). Although the general was largely above suspicion himself, his fellow officers—including Hamilton and the Order of the Cincinnati—were widely seen (perhaps with some justice) as lacking his fabled commitment to civilian supremacy. See generally M. JENSEN, *THE NEW NATION* 67–84, 261–65 (1950) (discussing Order, and Hamilton's personal involvement in military machinations of notorious Newburgh affair of 1783).



tuously to arms, without concert, without system, without resource  
 . . . . .<sup>279</sup>

In the United States, by contrast, should tyrannous national leaders attempt a coup,

the State governments with the people on their side would be able to repel the danger. . . . [The standing army] would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. . . . [L]ocal governments . . . . could collect the national will and direct the national force . . . .<sup>280</sup>

The very existence of small but expandable popular "shadow" armies organized by state governments could deter abuse of a much larger professional standing army organized by the national government—much as a would-be monopolist must take into account not only actual competitors but "shadow" competitors organized to enter the market if prices rise too high.<sup>281</sup> In the words of *The Federalist*: "[T]he existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple [as distinguished from a "compound" or dual-agency] government of any form can admit of."<sup>282</sup> By balancing military power between two jealous governments, the People would retain greater control over both. The national government could forcefully put down any purely local coup or insurrection threatening the republican government of a single state, but could be thwarted in any genuine scheme of national tyranny by an alliance of local militias led by state governments. "[A]s [the People] will hold the scales in their own hands, it is to be hoped [they] will always take care to preserve the constitutional equilibrium between the general and the State governments."<sup>283</sup>

*The Federalist's* discussion of the military check of federalism may strike modern readers as dangerous and embarrassing:<sup>284</sup> Dangerous be-

279. *THE FEDERALIST* No. 28, at 180 (A. Hamilton).

280. *Id.* No. 46, at 299–300 (J. Madison).

281. See, e.g., *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (Winter, J.).

282. *THE FEDERALIST* No. 46, at 299 (J. Madison).

283. *Id.* No. 31, at 197 (A. Hamilton); see also *id.* No. 11, at 87 (A. Hamilton) (using language identical to that of *The Federalist* No. 28 to describe how American People could benefit from balance of military power among European governments: America's navy "would at least be of respectable weight if thrown into the scale of either of two contending parties" (emphasis added)).

284. It may also strike some as antiquated. Whether guerrilla resistance orchestrated by state

cause it seems to invite—indeed, to celebrate—widespread state resistance to national authority; embarrassing because it seems to vindicate the position later taken by extreme states' rights theorists on behalf of nullification and, ultimately, secession. As we ponder the full meaning of Appomattox and Little Rock, we may wonder, can *The Federalist* be serious about this? And so the above-quoted passages tend to be dismissed ("Hamilton will say anything to win Anti-Federalist votes") or repressed ("a few isolated passages about the peculiarly eighteenth century issue of standing armies have little to teach us today in the aftermath of two Reconstructions").

Both of these reactions are unjustified. The political insincerity of *The Federalist* has been widely exaggerated. Too often, the fact that *The Federalist* worked brilliantly on a political level becomes a blanket excuse for the cynic to abdicate responsibility to take the text seriously on any other level.<sup>285</sup> True, the Papers are a shrewd political tract, but they are also a great work—perhaps this country's greatest work—of applied political philosophy. And Publius (the pen name of the joint authors of *The Federalist*) will not say just anything to win Anti-Federalist votes. In other passages, for example, he is emphatic that the ultimate judicial resolution of constitutional issues concerning the boundary between state and national powers must rest with *national* courts.<sup>286</sup> What's more, Publius plainly considers the military argument an important one. It is featured prominently in two different papers—one by Hamilton, one by Madison—and alluded to in several others. And of course, the subsequent

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militias is a plausible scenario in the event of an attempted coup in an age of supersophisticated federal weaponry is a question I leave to those with stronger credentials in military technology. *But see infra* text accompanying note 292.

285. I consider *The Federalist* to be the best single extra-textual source in explicating the Constitution. First, the Papers were consciously quoted and used more than any other source during the ratification period. When the Constitution was presented to the People themselves for their approval, *The Federalist* was the gloss that supporters of the Constitution regularly used to explain and defend the text to others. Second, the Papers brilliantly and elegantly package Federalist ideology by collecting in one place the myriad and interconnected Federalist arguments in the air in 1787–1788. Finally, and perhaps in recognition of both of these features of the Papers, the Supreme Court, its oral advocates, and political pamphleteers, *see, e.g.*, Marshall, *supra* note 49, at 193–94; Roane, *supra* note 103, at 113, generally accorded the work a special status very early on. Indeed, a catalogue of pre-1825 Supreme Court cases in which the Papers are invoked as special authority by bench or bar reads like a list of landmarks: *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54 (1795).

286. *See THE FEDERALIST* No. 22, at 150 (A. Hamilton); *id.* No. 39, at 245 (J. Madison); *id.* No. 82 (A. Hamilton); *cf. supra* note 162.

adoption of the Second Amendment only underscores the "necess[ity]" of a "well regulated Militia" to "the security of a free State."<sup>287</sup>

Properly understood, Publius' argument for the military check of federalism is extremely limited, yet equally important—and is in no way mooted by the Civil War or the civil rights crusade. Publius is not arguing for a general right of state militias, or anyone else, to engage in armed resistance whenever they believe that national authorities are acting unconstitutionally. Under ordinary circumstances, the People's remedies are political and legal, not military. And Publius makes clear that these political and legal questions are to be resolved, under ordinary circumstances, in *national* fora—Congress, the executive branch, and federal courts. The key qualification, of course, is the phrase "under ordinary circumstances." And by hypothesis, the scenario painted by Publius as the occasion for militia opposition is the extraordinary worst case of an attempted national coup. No political or legal remedies exist in this situation. Presumably national courts have been shut down, or, at best, their judgments are unenforceable. The only applicable law is martial law, enforced by gun and sword. In such a scenario, the only remedy left to the People would be military. As Hamilton carefully notes, recourse to arms in such an event would be justified by the traditional Lockean right to revolt whenever the government openly breaches its contract with the People: "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government . . ."<sup>288</sup>

This theory, it must be stressed, was not the one invoked by secessionists in 1861, nor could it have been. The national political channels remained open—Lincoln had won the Presidency, but the race was fair; the national courts remained open—if anything, the Taney Court stood as a shameless apologist for Southern interests;<sup>289</sup> and the national military had taken no steps to threaten civilians—on the contrary, Southern citizens launched the attack on Fort Sumter.<sup>290</sup> The "moderate" Confederate theory of secession rested on the right of each state convention to decide for itself whether the federal compact had been materially breached, regardless of what the federal courts or the Peoples of other states believed.<sup>291</sup> An even more extreme version of Confederate ideology rested

287. U.S. CONST. amend. II.

288. THE FEDERALIST No. 28, at 180 (A. Hamilton).

289. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

290. See A. LINCOLN, *supra* note 110, at 421–26; A. LINCOLN, *First Inaugural Address*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 264–71 (R. Basler ed. 1953) [hereinafter *First Inaugural Address*].

291. Southern complaints about the failure of several Northern states to enforce vigorously the federal Fugitive Slave Law seem largely makeweight. In any event, secession would only exacerbate

secession not on claims of federal usurpation, but rather on the sovereign right of the People of each state to alter or abolish their government at any time for any reason—even in violation of a pre-existing treaty. As we have seen, both these Confederate theories were premised on a view of sovereignty plainly inconsistent with the Federalist Constitution.

When we move from the Civil War era to our own, the military check of federalism might appear largely unnecessary given the seeming improbability of an attempted national coup in late twentieth century America. Yet this happy state of current affairs is perhaps partly due to the military check itself. The sturdy contemporary ethos of civilian supremacy that makes an attempted military takeover unlikely today draws much of its strength from an unblemished history of due subordination of the national military. That history, in turn, may well have been influenced by the military check. Of course we can never know what might have happened had the Federalists eliminated state militias; but perhaps the strongest evidence of the effectiveness of the framers' system of military checks is two centuries of civilian supremacy that have made a military coup almost unthinkable.<sup>292</sup>

### C. *Political Checks and Balances*

The ability of state governments to help implement the People's right to revolt in extraordinary times is paralleled by their ability to help enforce the People's constitutional rights under more ordinary circumstances.<sup>293</sup> Once again, the independent and pre-existing organizational structures of state governments were seen as incipient pockets of resistance—here, political resistance—to unconstitutional federal conduct. The People could

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the issue of fugitive slaves, and many other tensions between North and South. See *First Inaugural Address*, *supra* note 290, at 264-71.

292. Cf. *supra* note 278; 4 D. MACONE, *JEFFERSON AND HIS TIME* 7-11 (1970) (Republican leaders ready to use state militias to resist should lame duck Congress attempt to violate clear dictates of Article II by designating someone other than Aaron Burr or Thomas Jefferson as President in 1801; same Republican leaders willing to acquiesce peacefully should Congress lawfully opt for Burr over Jefferson, notwithstanding latter's superior moral and political claim to office).

293. Between the poles of military revolution and ordinary protection of existing constitutional rights is the case of constitutional amendment. Once again, the Federalist Constitution gave state governments a central role, by allowing two-thirds of the state legislatures to force Congress to call a constitutional convention. U.S. CONST. art. V. The Federalists knew that constitutional amendment might be necessary to check abuses by the national legislature, and they therefore carefully provided for modes of amendment that would not require congressional concurrence. See 1 M. Farrand, *supra* note 40, at 22 (Madison's 13th Virginia Resolution). Hamilton's words concerning amendments have a familiar ring: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." THE FEDERALIST No. 85, at 526.

Once again, however, constitutional federalism is symmetric: Because the Federalists knew that constitutional amendment might be necessary to check abuses of state governments, they also carefully provided for modes of ratification that would enable Congress to side-step state legislatures and directly appeal to the People in convention assembled. U.S. CONST. art. V.

confidently confer broad powers upon national agents precisely because they had also created a second set of specialized agents to monitor the first set and orchestrate resistance to its abuses. State legislatures would bring together persons with a special interest in and aptitude for political affairs whose daily duties would necessarily require them to attend closely to national politics.<sup>294</sup> At the first sign of a national abuse of power, they could sound a general alarm, communicating information and advice to their constituents and thereby winning their favor. The performance of colonial governments in monitoring Parliament and mobilizing opposition to various schemes of imperial oppression between 1763 and 1776 furnished an obvious historical precedent,<sup>295</sup> conjuring up an image of the state legislature that in some ways resembles the self-image of the institutional press today. In the words of *The Federalist*:

Independent of parties in the national legislature itself, . . . the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.<sup>296</sup>

It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community.<sup>297</sup>

Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. . . . A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thir-

294. Here and elsewhere, the Federalists recognized the efficiency of specialization of labor. See G. WILLS, *supra* note 22, at 108–11.

295. Cf. McLaughlin, *supra* note 78 (noting overlap between “states rights” and “individual rights” rhetoric in colonial arguments against Parliament).

296. THE FEDERALIST No. 26, at 172 (A. Hamilton). Note how the reference to “the ARM of . . . discontent” anticipates the military check argument.

297. *Id.* No. 28, at 181 (A. Hamilton); accord *id.* No. 84, at 516–17 (A. Hamilton).

teen sets of representatives, with the whole body of their common constituents on the side of the latter.<sup>298</sup>

The nation's first major constitutional crisis after ratification was resolved in a fashion strikingly consistent with *The Federalist's* vision of state legislatures as political watchdogs. In 1798, congressional supporters of President John Adams enacted several bills of dubious constitutionality designed in large part to stifle critics of the administration. The ability of the opposition press to attack the Alien and Sedition Acts was chilled by the prospect of prosecution under the Acts themselves. But if the Constitution's general protections for freedom of speech and the press under the First Amendment were somewhat unclear in 1798, the special constitutional protections for opposition speech in state legislatures were undeniable. These bodies thus took the lead in politically challenging Adams and the Acts. The legislatures of Virginia and Kentucky adopted resolutions declaring the Acts dangerous and unconstitutional, and inviting sister legislatures to do the same.<sup>299</sup> Despite some grand and ambiguous claims in the resolutions themselves, these enactments had no *legal* force.<sup>300</sup> Nonetheless, they served as useful *political* "instruments of redress" in alerting the People to the threat to their liberties and mobilizing political opposition to the Adams men. Although political agitation at the state level was unsuccessful in securing immediate repeal of the offensive legislation, it effectively transformed the national election of 1800 into a popular referendum on these bills. And with the accession of Thomas Jefferson to the Presidency and the electoral triumphs of the anti-Adams party in congressional races, enforcement of the Acts stopped, and they were quietly allowed to expire under their own terms in 1801.<sup>301</sup> The constitutional crisis was thus ultimately resolved by political decisions within the

298. *Id.* No. 46, at 298 (J. Madison). Madison's second sentence here seems to be a rather direct allusion to the intercolonial committees of correspondence that had emerged in the 1770's to coordinate opposition to parliamentary abuses.

299. Eight years earlier, the Virginia legislature had adopted resolutions denouncing as unconstitutional the federal government's assumption of state war debts. *Virginia Resolutions on the Assumption of State Debts*, in *DOCUMENTS OF AMERICAN HISTORY*, *supra* note 76, at 155-56 (describing state legislators as "guardians . . . of the rights and interests of their constituents" and "sentinels placed by them over the ministers of the federal government, to shield it from their encroachments, or at least to sound an alarm when it is threatened with invasion"). This 1790 declaration is an important link in the historical chain connecting the anti-parliamentary activity of colonial legislatures before 1776 with the resolutions of 1798. Note especially the use of the revealing word "ministers" to describe federal officers.

300. Madison, one of the chief architects of the resolutions, later conceded as much. See J. MADISON, *The Virginia Report of 1800*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 299, 346 (M. Meyers ed. 1973) [hereinafter *The Virginia Report of 1800*]; J. MADISON, *Letter to the North American Review*, in *id.* 531, 541-44.

301. See Powell, *Original Intent*, *supra* note 106, at 924-27.

national government itself, but under political conditions powerfully affected by the "alarm" that state legislatures had sounded.<sup>302</sup>

Unsurprisingly, the structure of horizontal separation of powers creates analogous incentives for signalling and political organizing. Even (or perhaps especially) if his veto is overridden, a President's veto message can serve as an important warning to the People that national legislators are attempting to breach the constitutional walls on their powers. So too with a judicial opinion, even (or perhaps especially) one that the political branches refuse to enforce. Indeed, Professor Ackerman's accounts of the elections of 1866 and 1936 as constitutional referenda of sorts neatly parallel mine here of the election of 1800, with the interesting difference that these later referenda were signalled by and organized around horizontal constitutional disputes between different branches of the national government.<sup>303</sup>

In fact, the analogy between separation of powers and federalism is even more precise, for both operate on a legal as well as a political level. A presidential veto on constitutional grounds has *legal* force. So does a federal court declaratory judgment that an act of Congress is unconstitutional. Likewise, state governments are more than mere political bodies. Unlike the press, a state legislature can do more than simply sound a political alarm.<sup>304</sup> Unlike the Virginia and Kentucky resolutions, not all actions by state legislatures need be viewed as naked declarations devoid of legal force. The Tenth Amendment reminds us that state governments have residuary powers to enact *law*. As we shall see, this fact has dramatic implications for the vindication of constitutional rights.

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302. The very magnitude of federal operations in the 20th century, combined with the rise of professional lobbyists, political parties, and the national media, may have reduced state legislatures' comparative institutional competence as watchdogs. Even today, however, state governments retain a comparative institutional advantage over nongovernmental watchdogs in one key respect. States furnish opponents of national policy with an opportunity to secure actual hands-on experience running government, thereby strengthening their credibility as qualified candidates in the next set of national elections. In a nonfederal system, any who would challenge an abusive national leadership must do so from either a minority "shadow government" position within the national government, or a leadership position outside civil government—e.g., the military or private corporations. Twentieth century America has had its share of national leaders coming from outside government—consider, for example, Herbert Hoover, Dwight Eisenhower, and (perhaps) Lee Iacocca—but it has also regularly tapped leaders of state government, such as Jimmy Carter and Ronald Reagan. Publius would not have been surprised by this state of affairs. See *THE FEDERALIST* Nos. 45, 56 (J. Madison).

303. See Ackerman, *supra* note 69, at 1051–70.

304. Professor Rapaczynski has offered an important analysis of how constitutional protections of state governments can be justified on organizational theory grounds similar to those used to support constitutional protections of press and association. See Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341. But as Professor Rapaczynski himself recognizes, one vital difference between state governments and other specially-protected organizations is that states wield limited "sovereign" powers to enact laws, *id.* at 389–91—a recognition in some tension with his general inclination to reject the usefulness of sovereignty theory.

D. *Legal Checks and Balances*

The general structure of separation of powers enables each national branch to thwart a national law it deems unconstitutional—Congress by declining to pass it; the President by vetoing it (or, if it is a criminal statute, by declining prosecution or pardoning those convicted); and the federal courts by engaging in judicial review. Of course, there are limits and exceptions to this general feature of one-branch veto. The President's veto may be overridden; conversely, a simple congressional majority, once having passed a law, cannot repeal it, even if it later deems the law unconstitutional, without the concurrence of the President. Nevertheless, built into the general structure of the Constitution is a libertarian bias based on checks against constitutionally suspect laws and in favor of the broadest of the various constructions of the constitutional right given by the three branches.<sup>305</sup>

The structure of separation of powers thus protects constitutional values by providing three separate, overlapping, and mutually reinforcing remedies—legislative, executive, and judicial—against unconstitutional federal conduct. A similar mechanism of overlapping legal remedies for constitutional wrongs is at work in the structure of federalism. A state government may violate the Constitution, yet fail to provide victims with a sufficient range of causes of action to ensure a full remedy for the wrong. Suppose complete redress in a particular situation requires joint and several strict liability of all state officials who participate in unconstitutional conduct, or entity liability of the state government itself, yet state law provides for neither. The beauty of constitutional federalism is that the *federal* government can furnish aggrieved individuals a supplemental remedy. Section 1983 is one example of such a federal remedy.<sup>306</sup>

There are structural reasons to believe that the federal supplemental remedy may systematically tend to be more generous than state-furnished remedies. To begin with, federal officials were not the perpetrators of the wrong, and thus will suffer no political embarrassment from any judicial proceedings that might publicize that wrongdoing. On the contrary, legislators in Congress can score political points among their constituents by casting themselves in the role of heroes rescuing victimized citizens from villainous state officials. Best of all, the rescue operation costs the federal government little: State officials, after all, will have to foot the liability bill. In any event, the citizen victims will typically enjoy the best of both

305. See THE FEDERALIST No. 73, at 443-44 (A. Hamilton); Amar, *supra* note 9, at 222-24, 258 n.170, 263 n.191.

306. 42 U.S.C. § 1983 (1982).



worlds, since they can invoke both state and federal remedies for the state wrong.<sup>307</sup>

Conversely, where the national government has violated constitutional rights, it may fail to provide adequate federal causes of action to fully remedy its own wrongs. It is not just coincidence that for over a century Congress has provided section 1983, a general cause of action against persons who violate constitutional rights "under color of state law," but no analogous cause of action against unconstitutional actions of federal officials<sup>308</sup>—a discrepancy narrowed, but not eliminated, by Congress only under pressure from the Supreme Court's holding in *Bivens v. Six Unknown Federal Agents*.<sup>309</sup> Once again, the beauty of federalism is that another government can provide citizens with additional causes of action. For reasons symmetrical to those canvassed above, state remedies should systematically tend to be more generous than those offered by Congress.<sup>310</sup> Once again, federalism's political incentives will help to enforce legal rights and vindicate the maxim, *ubi jus ibi remedium*.

Thus, far from justifying a gap between constitutional right and remedy, as the Court at times implies, federalism abhors a remedial vacuum. Citizens can rely on the federal government to provide supplemental remedies for constitutional wrongs committed by states, and vice versa.<sup>311</sup> Seen

307. All of this of course presupposes that significant sections of the polity continue to cherish constitutional values, and that governmental officials can thus improve their standing with constituents by affirming constitutional symbols. As Professor Charles Black has made clear, the Constitution cannot in the long run survive without ongoing popular affirmation. C. BLACK, *THE PEOPLE AND THE COURT* (1960). The only thing that the document itself can do—but it is a big "only thing"—is to structure institutions and symbols in ways that guard against temporary lapses and ever nudge us to affirm our better selves.

308. See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed." (citation omitted)).

309. 403 U.S. 388 (1971).

310. Indeed, there are stronger reasons to expect generous state law remedies for federal wrongs than vice versa. Every federal remedy is ultimately paid for by Americans—Congress' constituency—even though the expenditure is "off budget." By contrast, a state law remedy may politically externalize cost altogether by imposing at least part of the ultimate financial burden on out-of-staters. See *infra* text accompanying notes 352–55; cf. *THE FEDERALIST* No. 45, at 296 (J. Madison) ("A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular states.").

311. It might be said that the development of national parties reduces the willingness of officials in one government to embarrass officials of their own party in another government. But to say this is to say that political parties have blurred the Federalists' vertical separation of powers by fostering collusion among entities that were designed to compete against each other for popular sympathy. See *THE FEDERALIST* No. 27 (A. Hamilton); *id.* Nos. 45–46 (J. Madison). For similar reasons, the party system may have distorted horizontal competition within the national government. Perhaps this is one of the reasons that Madison in 1787 was so hostile to the notion of national parties. In any event, the point about national parties seems less applicable to a general congressional remedy that applies in all states, Democratic and Republican. Interestingly, the Republican framers of section 1983 designed it to apply to the then-Republican states of the North as well as the then-Democratic states of the South. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

in this light, the Tenth Amendment appears as the symmetrical counterpart of the enforcement clauses of the Civil War Amendments.

### 1. *Historical Examples*

The ability of the federal government to remedy state lawlessness may seem virtually self-evident given the central place of section 1983 in contemporary legal discourse.<sup>312</sup> Yet history provides equally dramatic examples of state remedies against federal abuses, which contemporary scholarship has tended to ignore.

#### a. *Fourth Amendment*

Consider first an example from the Fourth Amendment. Before the Supreme Court decided *Bivens v. Six Unknown Federal Agents* in 1971, the only damage remedy generally afforded to individuals whose homes had been unconstitutionally searched by federal agents was provided by the state common law of trespass. Without this state law cause of action, a citizen simply had no standing to get into court to challenge the constitutionality of the search and be compensated for the wrong done. Thus, for nearly the first two centuries of our constitutional history, only state law—created by dint of the reserved lawmaking power of states—furnished any redress for a species of concededly unconstitutional conduct by federal officials.

The structure of these pre-*Bivens* cases was quite simple: The ultimate issue before the court concerned the federal Constitution, but standing was conferred by the vertically-pendent state law cause of action.<sup>313</sup> Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on

312. For some interesting variations on the theme of federal protection of individual rights, see Cover & Alenikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

313. See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty, or immunity from suit." (citations omitted)); *id.* at 656 (Brennan, J., dissenting) (citing cases); Dellinger, *supra* note 13, at 1538-39 ("[T]he contemplated method [of Fourth Amendment] enforcement, the Government asserted [in *Bivens*], must have been a state common law action for damages in which the amendment would have operated to prevent defenses such as justification by reason of a general warrant." (citing Brief for Respondents at 11)); Gibbons, *supra* note 179, at 1943 n.296, 1948 n.320 (state law causes of action against federal officers "commonplace" during nineteenth century); see also Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1124, 1128-29 (1969) (citing cases).

federal power itself. If, but only if, plaintiff could in fact prove that the Fourth Amendment had been violated, defendant's shield of federal power would dissolve, and he would stand as a naked tortfeasor.

The structure of these cases is illustrative of the myriad ways in which constitutional "public law" protections are intricately bound up with—indeed, presuppose—a general backdrop of "private law" protections defining primary rights of personal property and bodily liberty.<sup>314</sup> Alexis de Tocqueville explicated this subtle interplay in *Democracy in America*: "The Americans hold that it is nearly impossible that a new [unconstitutional] law should not injure some private interest by its provisions. . . . [I]t is to these interests that the protection of the Supreme Court is extended."<sup>315</sup> And as Publius noted, in the same passage in which he spoke of states as "counterpoises" to federal power, *states* would typically define and protect these primary rights, thereby enlisting the affections of their citizens:

There is one transcendent advantage belonging to the province of the State governments . . . . [They will be] the immediate and visible guardian of life and property, . . . regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, . . . impressing upon the minds of the people affection, esteem, and reverence towards the government.<sup>316</sup>

The Court's decision in *Bivens v. Six Unknown Federal Agents*<sup>317</sup> does not moot the importance of federal-state remedial competition. In the best tradition of the remedial principles set forth in *Marbury v. Madison*,<sup>318</sup> the *Bivens* Court inferred a damage action directly under the Fourth Amendment. Yet the promise of this move was only partially fulfilled. Although we have seen that full remedies for constitutional violations will often require governmental liability,<sup>319</sup> lingering notions of sovereign immunity induced the *Bivens* Court to recognize only a cause of action against individual (and possibly judgment-proof) federal officers. Individual liability makes a good deal of analytic sense where standing is conferred by a cause of action that in no way depends upon state action. A

314. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

315. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 154-55 (Bradley ed. 1945).

316. THE FEDERALIST No. 17, at 120 (A. Hamilton); accord *id.* No. 45, at 292-93 (J. Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . ."); cf. U.S. CONST. amend. V (imposing obligation on *federal* government to accord "due process" to legal interests in "life, liberty, or property" protected, *inter alia*, by *state* law).

317. 403 U.S. 388 (1971).

318. 5 U.S. (1 Cranch) 137 (1803).

319. See *supra* text accompanying notes 244-60.

trespass cause of action applies to all individuals, whether or not the trespasser wears a uniform. By contrast, the *Bivens* cause of action is itself predicated upon a *governmental* wrong, and thus seems naturally to call for *governmental* liability.<sup>320</sup> That the Court did not restructure the case as *Bivens v. United States* is yet another unfortunate residue of the *Young* fiction.<sup>321</sup>

Moreover, even the cause of action that the *Bivens* Court did approve was subsequently qualified by a set of individual immunities that threaten to widen further the gap between right and remedy. Consider, for example, the case in which a federal magistrate wrongly issues a search warrant without probable cause. Assuming the warrant is issued *ex parte* and immediately executed, it is hard to imagine how the citizen victim could prevent the unconstitutional search from taking place. And after her home has been searched, she may still lack a federal remedy. The magistrate is absolutely immune; the federal agents are likely to enjoy good faith immunity—they did, after all, have a warrant; and the Federal Torts Claims Act may not apply. In this situation, state remedies such as trespass may continue to help plug the remedial gap.<sup>322</sup>

Apart from misguided doctrinal concerns about sovereign immunity, the Court's hesitation in *Bivens* and its progeny probably stems from a lingering doubt about whether remedy-fashioning is a more legislative than judicial function, and from an awareness of the special political vulnerability of federal judges in suits involving coercive relief against agents in coordinate branches of government.<sup>323</sup> On both of these counts, remedial competition between the political branches of state and national govern-

320. See Wolcher, *supra* note 225, at 285-86.

321. Ironically, *Young* was also the source of the *Bivens* Court's willingness to entertain suit directly under the Constitution even if no private tort suit lay. See *supra* note 218. It was this use of the Constitution as a self-executing cause of action, that was *Young's* analytic breakthrough—and not the notion that a government official acting unconstitutionally was “stripped” of immunity, a notion of much earlier vintage. See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 837-39 (1824). *Bivens* merely extended the injunctive principles of *Young* to suits for damages at law.

322. Although some of the language of the *Bivens* majority suggests the desirability of remedial uniformity, see, e.g., 403 U.S. at 395; *id.* at 409 (Harlan, J., concurring in judgment), the Court's true concern was with a constitutional remedial floor, and not with uniformity of Fourth Amendment remedies per se. Plainly, *Bivens'* holding in no way automatically ousts supplemental state law remedies that might be more generous in certain respects (e.g., on the individual immunity issue) than the Court-fashioned cause of action. Dellinger, *supra* note 13, at 1540. The continued permissibility of at least some broader state law causes of action suggests that the *Bivens* remedy itself does not exhaust the full range of the Fourth Amendment right, but may have been limited by institutional concerns. See *infra* text accompanying notes 323-25. If this were not so, any additional state law remedy would seem to be *pro tanto* an illegitimate tax on federal instrumentalities. See *infra* text accompanying notes 351-55.

323. Consider for example *Marbury v. Madison*. The most politically delicate part of Chief Justice Marshall's opinion was not his assertion of the power of federal courts to decline to apply acts of Congress they deemed unconstitutional, but his earlier claim that the judicial department could, in appropriate cases, order coercive relief directly against a defendant officer of the executive branch. Cf. 1 A. DE TOCQUEVILLE, *supra* note 315, at 106-07.

ment can strengthen judicial resolve. In confronting lawless conduct by one government, the federal courts need not stand alone if they can draw upon the remedial law and political support of a competing government. Thus, state governments can help federal courts implement truly full remedies that these courts—for purely institutional reasons—might hesitate to order on their own.<sup>324</sup> Separation of powers and federalism can reinforce each other here, creating possibilities for useful alliances between state governments and federal courts to keep the rest of the federal government honest.<sup>325</sup>

### b. *Habeas Corpus*

States need not confine their remedies to damages, nor have they historically. The ability of states to vindicate constitutional values through injunctive relief was perhaps nowhere more dramatic than in early state habeas corpus cases: State habeas offered a way for those imprisoned by federal officers in violation of their federal constitutional rights to win their freedom. In the mid-nineteenth century, however, the Supreme Court called into question this tradition of libertarian federalism. In *Ableman v. Booth*<sup>326</sup> and *Tarble's Case*,<sup>327</sup> the Court held that principles of national supremacy forbade state courts to inquire into the lawfulness of federal detention. Yet the Court's analysis in these cases was shaky, and its language quite sloppy. For example, scholarship by William Duker has established that the very purpose of the habeas non-suspension clause of Article I, section 9, was to protect the remedy of *state* habeas from being abrogated by the federal government;<sup>328</sup> the language of non-suspension obviously presupposes a pre-existing (state) common law habeas remedy. The non-suspension clause is powerful textual evidence confirming the general structural postulate that state remedies were intended to play a vital role in checking federal misconduct.<sup>329</sup> The clause also illustrates yet again the interplay of common law and constitutional

324. On underenforcement of legal norms created by institutional limitations of federal courts, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 175-77 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1986).

325. Cf. *Bivens*, 403 U.S. at 428 (Black, J., dissenting) ("[T]he fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so [alone] is, in my judgment, an exercise of power that the Constitution does not give us." (emphasis added)).

326. 62 U.S. (21 How.) 506 (1859).

327. 80 U.S. (13 Wall.) 397 (1872).

328. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-80 (1980).

329. Especially because the non-suspension clause is the original Constitution's most explicit reference to remedies. See Hill, *supra* note 313, at 1118 n.42.

protections of liberty. The common law would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement.

The principle of national supremacy that the Court invoked in *Ableman and Tarble's Case* seems irrelevant on the facts of those cases. The Constitution, and not the national government, is supreme in our legal system. Indeed, the Constitution's supremacy clause specifically charges state courts with the obligation to abide by it as the supreme law of the land.<sup>330</sup> That was precisely what the state courts in *Ableman* and *Tarble's Case* were doing when they sought to inquire into the legality of federal detention.

The Supreme Court's habeas doctrine reflects apparent concern that state courts might rule improperly on the merits—that is, on the question of the constitutionality of detention. But resolution of the merits by a state court would present a federal question that would trigger Supreme Court appellate review under the relevant jurisdictional statutes. Congress could go even further by providing for removal from state to federal court whenever it appeared that the lawfulness of detention would turn on the resolution of a federal question. Of course, in this removed proceeding, federal courts would be obliged to enforce the vertically-pendent state law habeas remedy—but this is precisely the point: Congress should not automatically be able to oust any state remedy it deems “inconvenient.” Full compliance with constitutional norms is often “inconvenient” from the government's point of view. *Ableman* and *Tarble's Case* can be justified only if they are understood simply as attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers.<sup>331</sup> So understood, these cases should not be read to allow a federal court vested with exclusive jurisdiction to disregard—to suspend—the state-law habeas remedy. Jurisdiction must be distinguished from the rule of decision, as the Tenth Amendment, the Rules of Decision Act, and the Eleventh Amendment's repudiation of *Chisholm* all make clear.

### c. *State Legislative Power and Federal Judicial Supremacy: A Neo-Federalist Synthesis*

The role of the states suggested by this neo-Federalist vision is at once similar to and different from state court “interposition.” According to

330. U.S. CONST. art. VI, para. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”).

331. This is, I believe, the prevailing understanding of *Ableman* and *Tarble's Case* among federal jurisdiction scholars. See, e.g., Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 80–84 (1981).

nineteenth century states' rights theorists, state courts had to be given un-reviewable power to hold federal conduct unconstitutional; only through this "interposition" of state court judges, it was argued, could federal encroachments against the Constitution be prevented.<sup>332</sup> In a more restrained version of this argument, Professor Henry Hart and other twentieth-century scholars have argued that Congress may *choose* to give state courts final jurisdiction over federal statutory and constitutional questions.<sup>333</sup> Yet the text and structure of Article III clearly seem to mandate that the last word on all federal question cases be vested in the federal judiciary, either at trial (via removal or exclusive federal jurisdiction<sup>334</sup>) or on appeal from state courts.<sup>335</sup> The neo-Federalist view offered here is fully consistent with the constitutional supremacy of federal over state courts.<sup>336</sup> The constitutionality of the federal conduct challenged in any given case would always pose a federal question whose ultimate resolution, along with all other federal questions raised, would always lie with federal courts. The role of the states is solely to provide victims of constitutional wrongs with the chance to have their federal rights defined and fully protected in federal court.<sup>337</sup> Thus, interposition theorists were right in believing that states had a vital part to play in vindicating individual constitutional rights against federal encroachments;<sup>338</sup> they were wrong in claiming that the Constitution's script gave state courts the last word on federal questions.<sup>339</sup>

332. See *supra* text accompanying notes 117–19.

333. See generally Amar, *supra* note 9, at 215–16, 220–29 (canvassing Hart school scholarship).

334. Congressional power to provide for exclusive federal jurisdiction in federal question cases—indeed in any category of Article III cases or controversies—is well established. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 428–31 (1867).

335. See Amar, *supra* note 9.

336. Even in constitutional disputes involving conflicting federal and state claims, federal courts can be seen as impartial umpires, since federal judges enjoy significant constitutional independence from the political branches of the federal government. Though this independence is not total, federal judges typically enjoy far more independence from their legislature than do state judges from theirs. See *id.* at 226–29, 233–38; cf. Marshall, *supra* note 49, at 208–12 (noting Senate's role in confirmation of federal judges).

337. Many have noted that Congress can typically confer Article III standing by creating a statutory right whose violation may be prosecuted in federal court. See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816 (1969). It is less noted, but equally true, that state legislatures can likewise confer standing. This way of thinking about standing might require re-examination of the holdings of *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

338. One of the main arguments for state interposition in Madison's *Virginia Report* of 1800 stressed that many constitutional encroachments by federal officers might not be challengeable in Article III courts. See *The Virginia Report of 1800*, *supra* note 300, at 305–06. However, if state governments can confer standing and force an Article III test of a wide range of dubious federal activity, there is little need to swallow the bitter pill of interposition in order to counteract federal judicial impotence.

339. Whereas the Hart school emphasizes the role of some state officials as *judicial* agents (impliedly independent of politics), the neo-Federalist view emphasizes the role of all state officials as *state* agents (impliedly independent of the national government). Neo-Federalist remedies may be

The 1882 Supreme Court case of *United States v. Lee*<sup>340</sup> elegantly dramatizes this neo-Federalist synthesis. If the case did not exist, one would be tempted to invent it. George Lee, son of General Robert E. Lee, brought suit in ejectment to recover possession of the family estate in Arlington, Virginia, the site of today's Arlington Cemetery. Federal military officers were occupying the lands under claim of federal title, the validity of which Lee disputed. During the Civil War, Congress had imposed on the land a nominal property tax that, under the terms of the statute, had to be paid in person by the land's owner. General Lee, otherwise engaged at the time, graciously declined Congress's invitation to walk unarmed into the enemy camp. Payment was tendered by others on Lee's behalf, but the government refused to accept. The government then foreclosed on the estate, and bought the land itself (at a bargain price) at the auction. Over the defendants' vigorous assertions of sovereign immunity, the Supreme Court held for Lee because the federal government's actions had violated the Fifth Amendment's due process and takings clauses.

Yet it was a state law cause of action that had enabled Lee to get into an Article III court in the first place. The case stands as a poetic reminder of the ways in which, short of interposition, nullification, secession, and Civil War (a war that perhaps could also have been captioned *United States v. Lee*)<sup>341</sup> states may serve as the "instrument of redress" for unconstitutional federal conduct.<sup>342</sup>

## 2. A Neo-Federalist Future: Converse-1983

A neo-Federalist view of constitutional remedies helps us to see more clearly what we have been doing all along: Perhaps without always realiz-

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furnished by either state judges fashioning common law or state legislators enacting statutes. The allocation of authority between these branches, and their internal organizational structure, are basically issues of state constitutional law. Since the Federalist Constitution nowhere prescribes the mechanism of appointment, tenure of office, salary guarantees, mode of removal, or substantive jurisdiction of state judges, the document evidently presumes that these officers may at times be "judges" in name only, little different from state legislators. The Hart school notwithstanding, it is unlikely that the Federalists placed their "ultimate" reliance on state judges qua judges. See Amar, *supra* note 9, 235-38.

340. 106 U.S. 196 (1882).

341. See *supra* note 19. It is perhaps worthy of note that final military judgment was entered at the Appomattox Courthouse.

342. Both *Tarble's Case*, decided in 1872, and *Lee*, handed down a decade later, obliged the Justices to begin to define the Civil War's implications for federalism. The holding of *Tarble's Case* correctly affirmed the supremacy of the federal judiciary over state judicial systems, see Amar, *supra* note 9, at 235-38, but the language seemed to go further. At times, the *Tarble* Court seemed to trivialize the legitimate role of states in protecting constitutional supremacy from federal encroachments. *Lee's* holding backed away from this extreme view, yet the Court's language was less than resounding in affirming the permissibility and value of state law checks against federal unconstitutionality. But cf. Hill, *supra* note 313, at 1124-25 (reading *Lee* to derive cause of action directly from Constitution rather than state law).



ing it, states have furnished, and are continuing to furnish, remedial aid and comfort to citizens victimized by federal unconstitutionality. Yet neo-Federalism is more than an historical connect-the-dots exercise through which we can see a larger pattern emerging from seemingly unrelated cases such as *Bivens*, *Tarble's Case*, and *United States v. Lee*. To reconceptualize past events is to imagine future possibilities. A brief exploration of one possible remedial scheme that states might try to adopt in the future will help to illuminate the scope and the limits of state power.<sup>343</sup>

Once the symmetry of the legal check of federalism is understood, a state government might be inclined to adopt a simple state statute inverting the language of 42 U.S.C. section 1983 in something like the following manner:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of [the United States], subjects, or causes to be subjected, any citizen of [this state] or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Would such a converse-1983 statute be permissible? At first blush, it might seem vulnerable to the following criticism: Unlike the other state law causes of action canvassed above, which applied generally against both private actors and government officials, a converse-1983 statute explicitly singles out the federal government as its target. It thus offends the basic principles of *McCulloch v. Maryland*<sup>344</sup>; it is an impermissibly discriminatory tax on federal instrumentalities. And the legitimacy of section 1983 itself does not necessarily prove the constitutionality of a converse-1983 statute, for as Chief Justice Marshall noted in *McCulloch*, very different principles are involved when the nation taxes a state. The part is represented in, and therefore may legitimately be bound by, the whole, but the reverse is not true.<sup>345</sup>

This line of criticism, while forceful, must be qualified. There is all the difference in the world between a state's attempt to thwart a legitimate, "necessary and proper" course of conduct adopted by the national government—the issue in *McCulloch*—and an otherwise analogous attempt to thwart illegitimate, ultra vires conduct that lacks constitutional sanc-

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343. Although attempting to address in at least cursory fashion the major constitutional issues posed by the generic converse-1983 statute, I shall not try to canvass the complex set of subsidiary questions that would be presented in the actual drafting of any particular statute.

344. 17 U.S. (4 Wheat.) 316 (1819).

345. *Id.* at 435-36.

tion.<sup>346</sup> A converse-1983 action does single out federal officials, but they *deserve* to be singled out. They wield extraordinary powers, capable of extraordinary abuse.<sup>347</sup> The framers expected and desired—indeed, relied on—states to keep a special eye on the federal government.<sup>348</sup>

A close reading of *McCulloch* itself confirms these principles. Chief Justice Marshall structures his opinion as a response to two questions. First, he considers whether the federal government can constitutionally create a national bank. Only after answering this question in favor of the federal government does he consider the second question of whether Maryland may nevertheless tax that bank. The clear implication of this way of structuring the analysis (and of several artfully drafted passages in the Court's discussion of the second question<sup>349</sup>) is that if the Bank had been unconstitutionally chartered, then Maryland could have taxed it.<sup>350</sup> It would have been an improperly authorized entity that could in no way partake of federal tax immunity.

*McCulloch* may nonetheless help to define the limits of permissible state remedies. For example, if a state were to provide for a minimum of one million dollars of presumed damages to any citizen whose home was unconstitutionally searched by the federal government, the remedy should

346. The converse-1983 statute proposed in the text is narrowly tailored: It penalizes only unconstitutional federal conduct. As Dean Ely has pointed out, a good fit with a legitimate purpose goes a long way towards relieving suspicions of unconstitutional motivation. J. ELY, *supra* note 234, at 145-48.

Nevertheless, the very existence of a converse-1983 cause of action might be thought to threaten legitimate federal operations by subjecting federal officers to possibly frivolous lawsuits. This danger, however, is not unique to converse-1983 suits—it applies equally to trespass suits, to *Bivens* suits, to habeas suits, and indeed, to virtually all litigation under the "American rule." Should Congress want to protect legitimate operations from bad-faith harassment, it should not be allowed to oust all converse-1983 actions: Such a reaction would itself be a poorly tailored proposal that would equally immunize illegitimate federal conduct and destroy legitimate legal claims of victims. See *infra* text accompanying notes 361-67. Congress could, however, provide for fee-shifting, which would tend to discourage frivolous claims against federal officers while fully preserving the rights of citizens who can prevail on the merits. Moreover, under the principles of the Tenth Amendment and *Erie*, the "arguably procedural" nature of a federal fee-shifting proposal would clearly justify its application in federal courts entertaining converse-1983 cases. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

347. See *Bivens v. Six Unknown Fed. Agents*, 403 U.S. 388, 391-95 (1971).

348. Of course, a state could eliminate all concern about discrimination by extending its converse-1983 statute to its own officers. While sufficient to save the statute's constitutionality, such an extension of the statute should not be necessary. The point is obviously an important one, for many of the political incentives that would generate a converse-1983 statute flow precisely from its asymmetric quality. If federal judges forced state governments to police themselves as vigorously as they police the federal government, many would police *neither* well. At least in the area of constitutional misdeeds, a certain amount of competition (and even discrimination) is positively desirable—"ambition must be made to counteract ambition" to protect "the rights of the people."

349. See 17 U.S. at 425-30 (speaking of "constitutional laws of the Union," "laws made in pursuance of the constitution," "legitimate operations of a supreme government," and of federal "right . . . to preserve" the bank (emphasis added)); see also *id.* at 427 ("The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.").

350. Or at least, very different ground rules about state taxation would have applied.

fail as an impermissible "tax" on federal operations. In a very limited sense, some violations of the Constitution by the federal government are inevitably necessary—if not, strictly speaking, proper—exercises of federal power. Thus, the creation of a state remedy that goes far beyond what is required to make the victim whole—a tax masquerading as a remedy—would violate *McCulloch* principles.

A slightly different formulation could perhaps be derived from a comment in *McCulloch*'s closing paragraph: "This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the State . . ."<sup>351</sup> This passage might support the following test for federal courts: A converse-1983 statute should be upheld so long as the burden of proof and damage provisions are roughly analogous to those under comparable causes of action that apply against private citizens. Because potential defendants under these other statutes are represented in the legislature, these statutes are unlikely to contain excessively punitive liability rules; thus this "nondiscrimination" test and the "nontax" test outlined above are unlikely to yield sharply divergent results.

Even under current Court doctrine, no sovereign immunity bar would stand in the way of a converse-1983 statute. As a doctrinal matter, sovereign immunity is inapplicable to damage suits against government officials in their individual capacities, where defendants have to pay out of their own pockets. As a practical matter, a converse-1983 statute—especially if it provided for strict liability, as it could consistently with *McCulloch*<sup>352</sup>—might well force the federal government to indemnify its officers. Without a promise of indemnification for negligent or good faith (but nonetheless unconstitutional) conduct, who would agree to work for the government?<sup>353</sup>

Direct indemnification (or higher salaries to compensate employees for their additional liability risk) would require payment from general funds. The benefits of a converse-1983 statute would be local, but the costs would be dispersed. In such a situation, every state legislature would have incentives to follow the lead of the first state whose converse-1983 statute was upheld by federal courts. The structure of payoffs may seem to create

351. 17 U.S. at 436.

352. I am assuming that the various individual immunities that currently limit *Bivens* actions, see *Butz v. Economou*, 438 U.S. 478 (1978), derive not from the limited nature of the federal constitutional right itself, but from *institutional* limitations on federal courts creating a margin of under-enforcement. See *supra* text accompanying notes 323–25; cf. *Pierson v. Ray*, 386 U.S. 547 (1967) (construing section 1983 as providing for various immunities of state officers in absence of clear congressional statement to contrary).

353. See Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 227–28 (1963). For a careful examination of the differences between individual liability *cum* indemnification and direct entity liability, see P. SCHUCK, *supra* note 249, at 82–121.

the potential for a classic "race to the bottom," yet I believe we should more properly view the political incentives as inducing a race to the top, a race to the banner of *ubi jus, ibi remedium*, a healthy race refereed by federal judges<sup>354</sup> ready to keep the contestants within the bounds of *McCulloch* and *Bivens*.<sup>355</sup>

Indeed, federal courts should allow states to go one step beyond individual strict liability in fashioning converse-1983 remedies. As we have seen, full remedies for constitutional wrongs will often call for direct government liability.<sup>356</sup> Yet the federal government may hesitate to create a cause of action against itself, so the question arises whether state governments can create such a cause of action. As a practical matter, the question is almost identical to that raised by a strict liability converse-1983 statute, since, as noted above, such a statute would likely oblige the federal government to absorb the ultimate cost. As a doctrinal matter, of course, the cases are different because current Court doctrine would immunize the federal sovereign from suit. Yet we have seen that current doctrine rests on a fatally flawed understanding of sovereignty and should be dis-

354. Every converse-1983 case would raise at least two federal questions. First, did the defendant violate the federal Constitution? Second, did the state remedy go beyond simply making plaintiff whole? The last word on these federal questions must in every case lie with an Article III court, and not a state court. See *supra* text accompanying notes 332-42. As a constitutional matter, Article III appellate review of state court decisions would suffice. If, however, Congress were concerned about state trial court overexuberance, it could of course always provide for removal or exclusive federal jurisdiction. *Id.* Thus, any concern about "abuse" of converse-1983 must ultimately be framed as a concern about federal courts, and not state governments. Indeed, state lawmakers might do well to borrow a page from certain long-arm jurisdiction statutes by simply authorizing damages "up to the limits" of the state's constitutional authority. Such open-ended language would once again leave federal courts with the task of defining and enforcing those limits.

355. Recent Supreme Court cases have dramatically restricted the use of the exclusionary rule to remedy Fourth Amendment violations. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984). Some state legislatures might try to respond by providing for a state exclusionary remedy applicable not just against state police officers, as Justice Brennan's scholarship invites, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (state constitutions may provide individuals with rights against state government that go beyond federal constitutional minima), but against federal agents as well. Such an effort, however, faces problems on two fronts.

First, a plausible argument can be made that the exclusionary rule overcompensates its beneficiaries by excluding unlawfully seized evidence that probably would have been seized anyway had the police followed the proper procedures *ex ante*. Put another way, the exclusionary rule may be applied in situations where, more likely than not, the illegality of a search—due to, say, a technical defect of the warrant—was not a but-for cause of the seizure of evidence. (In this respect, the exclusionary rule's overcompensation of victims is analogous to the hypothetical involving one million dollars of presumed damages, *supra* text accompanying note 351.)

Second, a state exclusionary rule would raise knotty Tenth Amendment and *Erie* issues insofar as it attempted to bind federal judges. The rule undeniably excludes material and probative evidence from trials whose primary focus is the criminal defendant's guilt or innocence. A federal rule that rejected exclusion in favor of promoting the truth-seeking function of that trial is more than "arguably procedural." See Ely, *supra* note 346. Unlike the other substantive causes of action considered above, the procedural nature of the exclusionary rule could perhaps limit the extent to which it necessarily binds federal courts as a residuary rule of decision.

356. See *supra* text accompanying notes 244-60.

carded.<sup>357</sup> A state law combining converse-1983 principles with rules of entity liability and respondeat superior should be upheld, so long as the liability provisions aimed at U.S.A., Inc. roughly track rules for private corporations under analogous state laws.

The complete absence of converse-1983 laws from state statute books today may seem to undercut the descriptive force of the neo-Federalist view that state legislatures have incentives to "race" to protect citizens against federal abuse.<sup>358</sup> However, there may be a quite simple explanation: State legislatures have not passed these statutes because they have been unaware of their constitutional authority to do so, and more generally, unaware of their special role and responsibility in protecting their constituents from federal lawlessness. This is perhaps a reflection of the inadequacy of contemporary legal discourse about federalism: In discarding the extremism of nullification and interposition, we have also thrown away a rich antebellum tradition emphasizing state protection of constitutional norms against the federal government.<sup>359</sup> Today's nationalists wrongly interpret the Civil War and the civil rights movement as establishing the supremacy of the national government, instead of the supremacy of the Constitution. They overread *McCulloch* and are overly hostile to states. By contrast, the Justices seem bent on invoking state sovereignty only as a paradoxical check against legitimate congressional and constitutional rights.<sup>360</sup> They overlook *McCulloch* and are overly hostile to remedies. Neither side has pursued a line of analysis that would welcome converse-1983 statutes. And so the legal imaginations of our state lawmakers have been unduly limited.

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357. *Id.*

358. Of course, state common law causes of action have always helped to keep the federal government in check. See *supra* text accompanying notes 312-42. But after the Civil War, state remedies against federal misconduct did not keep pace with expanded congressional remedies against state lawlessness: Congress adopted section 1983, but states failed to extend their antebellum common law tradition to the more self-conscious device of converse-1983 statutes.

359. Compare *Amphictyon*, *supra* note 107, at 58-59 (speaking of right and duty of states as "sentinels of the public liberty" to "remonstrate against the encroachments of power" and "resist the advances of usurpation, tyranny and oppression" and citing *The Federalist* No. 28) and 1 J. STORY, *supra* note 21, §§ 289-291 ("Perhaps, from the very nature and organization of our government . . . there will . . . be a strong line of division between those, who adhere to the state governments, and those, who adhere to the national government. . . . [T]his very division of empire may . . . be the means of perpetuating our rights and liberties, by keeping alive in every State at once a sincere love of its own government, and a love of the Union, and by cherishing in different minds a jealousy of each, which shall check, as well as enlighten, public opinion.") with Choper, *The Scope of Judicial Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552, 1611 (1977) ("the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms has no solid historical or logical basis").

360. See *supra* note 211.

### 3. *The Remedial Dialogue*

One final set of complications should be noted. The variety of remedies adopted by different states might create a crazy quilt of legal intricacies threatening to confound efficient and uniform execution of national operations, and perhaps tending to erode the sense of national identity that the Constitution was meant to symbolize. In such a situation, Congress might seek to preempt these various state remedies with a uniform regime of exclusive federal remedies. Yet we must not bow too quickly to this assertion of federal power; the remedial imperative must be harmonized with, rather than sacrificed to, the desiderata of government efficiency and national unity.

The Tenth Amendment can aid analysis here. The reserved law-making power of the states means that state-created remedies are automatically in force, unless displaced by a federal law falling within the finite (though broad) powers of the national government. Congress enjoys no *explicit* power to preempt state remedies for unconstitutional federal conduct. Moreover, whereas congressional power to create federal remedies for federal constitutional wrongs seems obviously "necessary and proper," the power of Congress to destroy state remedies is not so obviously implicit in our constitutional structure. Furthermore, where the state is performing a vital and (to borrow from the lexicon of recent Tenth Amendment case law) "traditional" state function<sup>361</sup> of policing against federal constitutional wrongs, countervailing federal power should not be lightly assumed.<sup>362</sup> To give Congress plenary power to nullify any state remedy it disliked would disturb the careful constitutional balance of federalism, and would ultimately imperil individual constitutional liberty by weakening an important check against federal abuse.<sup>363</sup>

Congress must not be allowed to use national uniformity as a pretext to

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361. *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 683 (1982) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)).

362. See generally Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81. Although Professor Nagel's analytic framework to my mind fails to justify the Court's holding in *National League of Cities*, the framework would, it seems, justify strict judicial review of any congressional attempt to preempt state law remedies against unconstitutional federal conduct.

363. The government's brief in *Bivens* buttressed its argument that federal courts should not infer a damage remedy directly under the Constitution by pointing to the role of states in restraining abuses of federal power. On the issue before the *Bivens* Court, this argument borders on non sequitur: Federalism and separation of powers are not mutually exclusive, but mutually reinforcing and complementary structures for fully vindicating constitutional rights. See *supra* text accompanying notes 323-25. The government's argument, however, does suggest why congressional attempts to destroy state remedies should receive special scrutiny. Indeed, it is noteworthy that in response to myriad and at times obstructionist lawsuits against federal officials based on state law causes of action in the nineteenth century, Congress responded not by attempting to destroy the causes of action themselves, but simply by providing for removal jurisdiction. See Gibbons, *supra* note 179, at 1948 n.319.

deny full remedies for federal unconstitutional conduct. Uniformity is just as well served by uniformly full, as by uniformly inadequate remedies. Thus, to demonstrate a bona fide purpose—such as the avoidance of an obstacle course of diverse state law remedies—Congress should be obliged to provide an exclusive federal remedy that is as effective as the fullest state remedy<sup>364</sup> it seeks to displace.<sup>365</sup> Unless Congress furnishes such a remedy, federal courts should invalidate any effort to preempt state remedies.<sup>366</sup> Hence, even where states are denied the last word on remedies for federal constitutional wrongs, they have the power to compel a dialogic response from Congress that is more generous to aggrieved citizens than the congressional *status quo ante*.<sup>367</sup>

#### IV. CONCLUSION

The neo-Federalist view sketched here recognizes the vital role of federal courts, but also emphasizes the important part that other institutions—such as Congress, state courts, and state legislatures—can play in shaping and promoting constitutional values. The argument here is not merely historical, but hortatory: Even if states have not always taken seriously their role in protecting individual constitutional rights against the federal government, they should do so. All those who wield the power of government—Court and Congress, state judge and state legislator—should take seriously the obligation to use that power to promote the ultimate sovereignty of the People as embodied in the Constitution.<sup>368</sup>

364. This assumes, of course, that the state remedy itself is not overcompensatory, and therefore voidable by federal courts even without congressional intervention. See *supra* text accompanying notes 351–55.

365. Even if this rule were rejected, federal courts could at least deploy a clear statement doctrine allowing them to follow state remedial law absent express congressional preemption.

366. Any state law remedy—whether judge-made or statutory—for a violation of a congressionally created right is subject to a strict preemption analysis. The question is always one of congressional intent: Did Congress, as the source of the right, intend to allow the particular supplemental state remedy? See Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1157–62 (1985). Here, by contrast, we deal with rights not of congressional creation, rights *against* the federal government. In this area, the remedial role of state governments is one of constitutional entitlement, not congressional suffrance.

367. Once again, the analogy between separation of powers and federalism is instructive. The remedial dialogue between the states and Congress contemplated here closely parallels the Court–Congress remedial dialogue contemplated by the Supreme Court's creation of "constitutional common law" in *Bivens*. In *Bivens*, the Court fashioned a damage remedy in the first instance for federal violations of the Fourth Amendment, but indicated that this remedy could be displaced if Congress chose to create an alternative, "equally effective" remedy. *Bivens v. Six Unknown Fed. Agents*, 403 U.S. 388, 397 (1971). In fact, Congress later took up the Court's invitation to participate in a remedial dialogue when it amended the Federal Torts Claims Act in the wake of *Bivens*. See Pub. L. No. 93-253, § 2; 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h) (1982)).

368. At the outset of this essay, I posed the question whether our Constitution was "divided against itself." See *supra* text accompanying note 9. We are now in a position to see the answer to that question. Unlike the Confederations of the 1780's and 1860's, the Federalist Constitution securely rests on the sovereignty of a unitary People. Although the Constitution does divide power among

Today's Court seems to have lost sight of the People—and so it has transmogrified doctrines of federalism and sovereignty into their very antitheses. Sovereign immunity allows “sentinels” hired to uphold the law to become gunmen who are a law unto themselves. And “Our Federalism” perverts a structure designed to assure full remedies for constitutional wrongs into a system that regularly frustrates the remedial imperative. Whenever the rhetoric of “states’ rights” is deployed to defend states’ wrongs, our servants have become our masters; our rescuers, our captors.<sup>368</sup>

The Constitution is two hundred years old this year. Perhaps the best way we could celebrate this enduring document would be to ask whether current legal doctrines do full justice to it, to its makers, and to ourselves.

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competing agents, it does so precisely to protect that unitary People: The Constitution's compound structure is in harmony with its substantive themes of popular sovereignty and limited government.<sup>369</sup>

The perverted use of *genus* and *species* in logic and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by *States* and *sovereigns*, in politics and jurisprudence; in the politics and jurisprudence even of those, who wished and meant to be free. . . .

. . . [S]tates and governments were made for man . . . [yet] his creatures and servants have first deceived, next vilified, and at last oppressed their master and maker. . . .

. . . Let a state be considered as subordinate to The People.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454-55 (1793) (opinion of Wilson, J.) (emphasis altered).



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**STANDING COMMITTEE ON FINANCE  
(2011-12)**

**FIFTEENTH LOK SABHA**

**Ministry of Planning**

**THE NATIONAL IDENTIFICATION AUTHORITY OF INDIA  
BILL, 2010**

**FORTY-SECOND REPORT**



**LOK SABHA SECRETARIAT  
NEW DELHI**

December, 2011/ Agrahyana, 1933 (Saka)

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**FORTY-SECOND REPORT**  
**STANDING COMMITTEE ON FINANCE**  
**(2011-2012)**  
**(FIFTEENTH LOK SABHA)**

Ministry of Planning

**THE NATIONAL IDENTIFICATION AUTHORITY OF  
INDIA BILL, 2010**

*Presented to Lok Sabha on 13 December, 2011*  
*Laid in Rajya Sabha on 13 December, 2011*



**LOK SABHA SECRETARIAT**  
**NEW DELHI**

December, 2011/ Agrahyana, 1933 (Saka)

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**COMPOSITION OF STANDING COMMITTEE ON FINANCE – 2011-2012**

**Shri Yashwant Sinha - Chairman**

**MEMBERS**

**LOK SABHA**

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3. Shri Jayant Chaudhary
4. Shri Harishchandra Deoram Chavan
5. Shri Bhakta Charan Das
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29. Dr. Mahendra Prasad
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31. Shri Yogendra P. Trivedi

**SECRETARIAT**

- |                                 |   |                  |
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| 1. Shri A.K. Singh              | - | Joint Secretary  |
| 2. Shri R.K. Jain               | - | Director         |
| 3. Shri Ramkumar Suryanarayanan | - | Deputy Secretary |

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## INTRODUCTION

- I, the Chairman of the Standing Committee on Finance, having been authorized by the Committee, present this Forty-Second Report on "The National Identification Authority of India Bill, 2010".
2. The National Identification Authority of India Bill, 2010 introduced in Rajya Sabha on 3 December, 2010 was referred to the Committee on 10 December, 2010 for examination and report thereon, by the Speaker, Lok Sabha under Rule 331E of the Rules of Procedure and Conduct of Business in Lok Sabha.
  3. The Committee obtained background note, detailed note and written information on various provisions contained in the aforesaid Bill from the Ministry of Planning.
  4. Written suggestions / views / memoranda on the provisions of the Bill were received from various institutions / experts / individuals.
  5. The Committee took briefing / oral evidence of the representatives of the Ministry of Planning and the Unique Identification Authority of India (UIDAI) at their sitting held on 11 February, 2011.
  6. At the sitting held on 29 June, 2011, the Committee heard the views of the representatives of (i) the National Human Rights Commission (NHRC), and (ii) the Indian Banks Association (IBA), and Dr. Reetika Khera, Visitor, Delhi School of Economics, New Delhi. The Committee also heard the views of the representatives of the Confederation of Indian Industry (CII), and experts namely, Dr. Usha Ramanathan, Independent Law Researcher, New Delhi, Dr. R. Ramakumar, Associate Professor, the Tata Institute of Social Sciences, Mumbai and Shri Gopal Krishna, Member, Citizen Forum for Liberties, New Delhi at the sitting held on 29 July, 2011.
  7. The Committee, at their sitting held on 8 December, 2011 considered and adopted this Report.

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8. The Committee wish to express their thanks to the officials of the Ministry of Planning and the Unique Identification Authority of India (UIDAI) for furnishing the requisite material and information which were desired in connection with the examination of the Bill. The Committee would also thank all the institutions and experts for their valuable suggestions on the Bill.

9. For facility of reference, the observations/recommendations of the Committee have been printed in thick type in the body of the Report.

New Delhi;  
9 December, 2011  
20 Aghrayana, 1933(Saka)

YASHWANT SINHA,  
Chairman,  
Standing Committee on Finance

## REPORT

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### PART - I

#### A. Introduction

1. With a view to ensure that the benefits of centrally sponsored schemes reaches to right person and not misused, the Central Government had decided to issue unique identification numbers to all residents in India and to certain other persons. The scheme of unique identification involves collection of demographic and biometric information from individuals for the purpose of issuing of unique identification numbers to such individuals. The Central Government, for the purpose of issuing unique identification numbers, constituted the Unique Identification Authority of India (UIDAI) on 28<sup>th</sup> January, 2009, being executive in nature, which is at present functioning under the Planning Commission.
2. It has been observed and assessed by the Government that the issue of unique identification numbers may involve certain issues, such as (a) security and confidentiality of information, imposition of obligation of disclosure of information so collected in certain cases, (b) impersonation by certain individuals at the time of enrolment for issue of unique identification numbers, (c) unauthorised access to the Central Identities Data Repository (CIDR), (d) manipulation of biometric information, (e) investigation of certain acts constituting offence, and (f) unauthorised disclosure of the information collected for the purpose of issue of unique identification numbers, which should be addressed by law and attract penalties.
3. In view of the foregoing paragraph, the Government has felt it necessary to make the said Authority as a statutory authority for carrying out the functions of issuing unique identification numbers to the residents in India and to certain other persons in an effective manner. It is, therefore, proposed to enact the National Identification Authority of India Bill, 2010 to provide for the establishment of the National Identification Authority of India (NIDAI) for the purpose of issuing identification numbers (which has been referred to as aadhaar number) to individuals residing in India and to certain other classes of individuals and manner of authentication of such individuals to facilitate access

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to benefits and services to which they are entitled and for matters connected therewith or incidental thereto.

**B. Objectives and Salient Features of the Bill**

4. The National Identification Authority of India Bill, 2010, introduced in Rajya Sabha on 3<sup>rd</sup> December, 2010, *inter alia*, seeks to provide—

- (a) for issue of aadhaar numbers to every resident by the Authority on providing his demographic and biometric information to it in such manner as may be specified by regulations;
- (b) for authentication of the aadhaar number of an aadhaar number holder in relation to his demographic and biometric information subject to such conditions and on payment of such fees as may be specified by regulations;
- (c) for establishment of the National Identification Authority of India consisting of a Chairperson and two part-time Members;
- (d) that the Authority to exercise powers and discharge functions which, *inter alia*, include—
  - (i) specifying the demographic and biometric information for enrolment for an aadhaar number and the processes for collection and verification thereof;
  - (ii) collecting demographic and biometric information from any individual seeking an aadhaar number in such manner as may be specified by regulations;
  - (iii) maintaining and updating the information of individuals in the CIDR in such manner as may be specified by regulations;
  - (iv) specify the usage and applicability of the aadhaar number for delivery of various benefits and services as may be provided by regulations;
- (e) that the Authority shall not require any individual to give information pertaining to his race, religion, caste, tribe, ethnicity, language, income or health;
- (f) that the Authority may engage one or more entities to establish and maintain the CIDR and to perform any other functions as may be specified by regulations;
- (g) for constitution of the Identity Review Committee consisting of three members (one of whom shall be the chairperson) to ascertain the extent and pattern of usage of the aadhaar numbers across the country and prepare a report annually in relation to the extent and pattern of usage



of the aadhaar numbers along with its recommendations thereon and submit the same to the Central Government;

(h) that the Authority shall take measures (including security safeguards) to ensure that the information in the possession or control of the Authority (including information stored in the CIDR) is secured and protected against any loss or unauthorized access or use or unauthorized disclosure thereof; and

(i) for offences and penalties for contravention of the provisions of the proposed legislation.

### **C. Evolution of the UIDAI**

5. The concept of a Unique Identification (UID) scheme was first discussed and worked upon since 2006 when administrative approval for the scheme "Unique ID for BPL families" was given on 3<sup>rd</sup> March, 2006 by the Department of Information Technology, Ministry of Communications and Information Technology.

6. Subsequently, a Processes Committee was set up on 3<sup>rd</sup> July, 2006 to suggest processes for updation, modification, addition and deletion of data fields from the core database to be created under the said project. The Committee appreciated the need of a UID Authority to be created by an executive order under the aegis of the Planning Commission to ensure a pan-departmental and neutral identity for the Authority.

7. Thereafter, since the Registrar General of India was engaged in the creation of the National Population Register (NPR) and issuance of Multi-purpose National Identity Cards to citizens of India, it was decided with the approval of the Prime Minister, to constitute an Empowered Group of Ministers (EGoM) to collate the two schemes – the NPR under the Citizenship Act, 1955 and the UID scheme. The EGoM was also empowered to look into the methodology and specific milestones for early and effective completion of the scheme and take a final view on these. The EGoM was constituted on 4<sup>th</sup> December, 2006 and a series of meetings took place as follows:-

a) First meeting of EGoM: 22<sup>nd</sup> November, 2007 :

- Recognized the need for creating an identity related resident database regardless of whether the database is created based on a

de-novo collection of individual data or is based on already existing data such as the voter list.

- Need to identify and establish institutional mechanism that will own the database and be responsible for its maintenance.

b) Second meeting of EGoM: 28<sup>th</sup> January, 2008

- The proposal to establish UID Authority under the Planning Commission was approved.

c) Third meeting of EGoM: 7<sup>th</sup> August, 2008

- Referred certain matters raised with relation to the UIDAI to a Committee of Secretaries for examination.

d) Fourth meeting of EGoM: 4<sup>th</sup> November, 2008

- It was decided to notify UIDAI as an executive authority. Decision on investing it with statutory authority would be taken up later.
- UIDAI would be anchored in the Planning Commission for five years after which a view would be taken as to where the UIDAI would be located within Government.

8. The UIDAI was constituted on 28<sup>th</sup> January, 2009 under the Chairmanship of Shri Nandan M. Nilekani as an attached office under the aegis of the Planning Commission. The UIDAI was *inter-aila* given the responsibility to lay down plan and policies to implement the UID scheme, own and operate the UID database and be responsible for its updation and maintenance on an ongoing basis. The Prime Minister's Council of UIDAI and a Cabinet Committee on UIDAI (called CC-UIDAI) were set up on 30<sup>th</sup> July, 2009 and 22<sup>nd</sup> October, 2009 respectively for achieving the objectives of the Authority.

9. Asked why the matter of conferring statutory status to the UIDAI was deferred, the Ministry of Planning have submitted their written response as under:-

"Based on the proposal that formation of the UIDAI under the Planning Commission would ensure better coordination with different departments, it was decided that initially the UIDAI may be notified as an executive authority under the Planning Commission and the issue of investing the UIDAI with statutory authority and the reconciliation of such statutory role with National Registration Authority (NRA) can be considered at an appropriate time".

10. Justifying the extension of the UID scheme, which is initially intended for BPL families, to all residents and other categories of individuals, the Ministry of Planning in their written response have submitted as under:-

"The UID scheme was extended to all residents and other categories of individuals to gradually do away the *de novo* exercises each time for field level data collection. Simultaneously, it would also ensure that links to more and more identity based databases are created by inclusion of the UID number in their databases".

11. In this regard, Dr. R. Ramakumar, Expert, in his post-evidence reply has, among other things, added as follows:-

".....it has been proven again and again that in the Indian environment, the failure to enroll with fingerprints is as high as 15% due to the prevalence of a huge population dependent on manual labour. These are essentially the poor and marginalised sections of the society. So, while the poor do indeed need identity proofs, aadhaar is not the right way to do that...."

12. The Ministry in their written reply have stated, among other things, that :-

"While there may be a number of factors contributing to the failure to enroll (like geography, age groups, occupation etc.) and the figures quoted..... may not hold good in all situations, failure to enroll is a reality.... For enrolment purpose, UIDAI has already built in processes to handle biometric exceptions."

**D. Issuance of aadhaar numbers pending passing the Bill by Parliament**

13. Justice Dr. M. Rama Jois, MP (Rajya Sabha) in his representation addressed to the Chairman, Standing Committee on Finance has *inter-alia* pointed out since the NIDAI Bill is pending for consideration before the Standing Committee on Finance, implementation of the provisions of the Bill, issue of aadhaar numbers and incurring expenditure from the exchequer by the Government is a clear circumvention of Parliament, and therefore, should be kept in abeyance awaiting debate in and decision of both Houses of Parliament.

14. On being asked about the legal basis under which the UIDAI is functioning at present, and the mechanism that the UIDAI has adopted, since its inception, to deal with any of the issues like security and confidentiality of

information and other offences related to issue of the aadhaar numbers, the Ministry of Planning in a written reply have *inter-alia* stated that:-

"...The matter about commencement of operation of the UIDAI before a legal framework was put in place was referred to the Ministry of Law & Justice wherein opinion was sought on the issue whether in absence of a specific enabling law, would there be any constraints in collecting the data (including biometrics) and in issuing the UID numbers to residents in accordance with the mandate given to the Authority. The Ministry of Law & Justice, after examining the matter, had mentioned that it is a settled position that powers of the Executive are co-extensive with the legislative power of the Government and that the Government is not debarred from exercising its executive power in the areas which are not regulated by specific legislation. It had also been opined that till the time such legislation is framed the Authority can continue to function under the executive order issued by the Government and the scheme that may be prepared by the UIDAI. It was also opined that the Authority can collect information/data for implementation of the UID scheme. Such implementation can be done by giving wide publicity to the scheme and persuading the agencies/individual to part with necessary information.

The UIDAI has not faced issues such as breach of security and confidentiality, manipulation of biometrics, unauthorized access to the CIDR or other related offences since its inception.....till the time Parliament passes the Bill, these matters will be covered by the relevant laws".

15. The opinion of the Attorney-General of India on the above mentioned issues as obtained by the Ministry of Law & Justice (Department of Legal Affairs) is furnished below:-

"The competence of the Executive is not limited to take steps to implement the law proposed to be passed by Parliament. Executive Power operates independently. The Executive is not implementing the provisions of the Bill. The Authority presently functioning under the Executive Notification dated 28<sup>th</sup> January, 2009 is doing so under valid authority and there is nothing in law or otherwise which prevents the Authority from functioning under the Executive Authorisation.

The power of Executive is clear and there is no question of circumventing Parliament or the Executive becoming a substitute of Parliament. On the contrary, what is sought to be done is to achieve a seamless transition of the authority from an Executive Authority into a statutory authority.

All the expenditure which is being incurred is sanctioned by Parliament in accordance with the financial procedure set forth in the Constitution. If the Bill is not passed by any reason and if Parliament is of the view that

the Authority should not function and express its will to that effect, the exercise would have to be discontinued. This contingency does not arise.

The present Bill being implemented without Parliaments' approval does not set a bad precedent in the Parliamentary form of Government. On the contrary, the fact that the Authority is sought to be converted from an Executive Authority to a statutory authority, it underlines the supremacy of Parliament".

16. On this issue, Dr. Usha Ramanathan, Expert, in her post-evidence reply has *inter-alia* stated that:-

"Article 73 of the Constitution delineates the extent of executive power of the Union and describes it as extending to matters with respect to which Parliament has power to make laws.....

While the executive power of the Union, and of the States, is co-extensive with the legislative power of the Union and the States, this is a provision that sets out the limits of the power. These are not provisions that are meant to make Parliament, or the legislatures, redundant. While executive power cannot extend beyond the legislative power of the Union and the States, Parliament and the legislatures can, and routinely do, set out the terms on which the executive is to function. This is also how 'delegated legislation' or 'subordinate legislation' has to be within the extent of the 'parent statute'.....

It is a plain misconception to think that the executive can do what it pleases, including in relation to infringing constitutional rights and protections for the reason that Parliament and legislatures have the power to make law on the subject".

#### **E. UID scheme**

17. A resident who seeks to obtain an aadhaar number shall provide his / her demographic and biometric information to enrolling agencies appointed by Registrars. A resident who does not possess any documentary proof of identity or proof of address can obtain an aadhaar number by being introduced by an introducer.

18. The UIDAI has executed Memoranda of Understanding (MoU) with the partners including all the States and Union Territories, 25 financial institutions (including LIC) to act as Registrars for implementing the scheme. The roles and responsibilities of the partners flow from the MoU.

19. The UIDAI requires only basic identity data such as name, age, gender, address and relationship details in case of minors, for issue of unique identity number. This is commonly known as 'Know your Resident (KYR)'. The partner registrars are using this resident interface as an opportunity to update their own selected data bases such as ration card number, MGNREGS job card number, PAN card etc. This is commonly known as 'Know your Resident Plus' (KYR+). Collection of these information is purely an initiative of respective Registrars and not mandatory for issue of aadhaar number.
20. The UIDAI is collecting bare minimum demographic information from the residents; any other kind of information, viz., rural, semi-urban and urban areas, persons with disabilities, migrant unskilled and unorganized workers, nomadic tribes and others who do not have any permanent dwelling house, is not available with UIDAI. Asked how the coverage of marginalized sections of population, without having the data of aadhaar numbers issued to them, could be achieved, the Ministry has submitted that the Authority proposes to cover the marginalized and poor sections of the population through special enrolment camps organized for them.
21. In a news item dated 6<sup>th</sup> September, 2011, it has been reported that the Ministry of Home Affairs have identified flaws in the enrolment process followed by the UIDAI, citing cases where people have got aadhaar numbers on the basis of false affidavits.
22. Further, an expert has brought to the notice of the Standing Committee on Finance that issues of liability and responsibility for maintaining accuracy of data on the Register, conducting identity checks and ensuring the integrity of the overall operation of the UID scheme have not been resolved. On being asked to comment on this, the Ministry of Planning have submitted a written reply as follows:-
- ".....Registrars have to put processes in place to ensure that the data collected is accurate. It is also the responsibility of the Registrars to appoint verifiers (for verifying the documents presented by the resident) and introducers to handle cases where the residents do not have any documents".

23. It has been reported in a news item that the Ministry of Home Affairs have alleged that some of the registrars have not adhered to the laid down procedures under UIDAI. It has also been noticed that the Government of Kerala *vide* G.O.(MS)No:16/2011/ITD dated 3<sup>rd</sup> June, 2011 has *inter-alia* stated that the MoU was signed between UIDAI and Government of Kerala for implementation of the UID project subject to condition that the clauses on the standards, protocol, criteria etc. in the MoU shall be in accordance with the State IT policy.

#### **F. Global Experience**

24. It has been brought to the notice of the Standing Committee on Finance that on the basis of the findings of London School of Economics (LSE) report, the Government of United Kingdom has abandoned its ID project (repealed its Identity Cards Act, 2006) citing a range of reasons, which includes high cost, unsafe, untested and unreliable technology, and the changing relationship between the state and the citizen etc.

To a specific issue of relevance of any of the above mentioned factors in the Indian context, it has been informed by the Ministry as follows:-

"There are significant differences between the UK's ID card project and the UID project and to equate the two would not be appropriate. The differences are as follows:-

a) The UK system involved issuing a card which stored the information of the individual including their biometrics on the card. UID scheme involves issuing a number. No card containing the biometric information is being issued. UK already has the National insurance number which is used often as a means to verify the identity of the individual.

b) The statutory framework envisaged made it mandatory to have the UK ID card. Aadhaar number is not mandatory.

c) The data fields were large and required the individual to provide accurate information of all other ID numbers such as driver's license, national insurance number and other such details thereby linking the UK ID card database to all other databases on which the individual was registered. UID Scheme collects limited information and the database is not linked to other databases.

d) In UK, the legislative framework and structure approached it from a security perspective. The context and need in India is different. The UID scheme is envisaged as a mean to enhance the delivery of welfare benefits and services".

25. When asked as to whether any analysis has been carried out on the experience of countries where National IDs are in use as well as countries where it has been discontinued, the Ministry have *inter-alia* informed the Committee in a written reply as follows:-

"In some countries the use of smart cards to store significant data about the resident added to concerns about ID fraud and duplication.....

The comparisons between developed countries, which are looking at additional ID forms from a security perspective, versus India, a developing country which, like Brazil and Mexico, is attempting to, build the basic identity and verification infrastructure essential to delivering welfare benefits, and promoting inclusive growth, is not a reasonable one".

**G. Existing identity forms vs need for aadhaar number**

26. A view has been expressed that adding another form of identity (i.e. aadhaar number) without studying the possibility of using the existing forms of identity, for example, Voter ID card, to solve the current problems appears to be a waste of resources.

27. The Ministry of Planning in a written submission have *inter-alia* stated the following:-

".....in the current framework there is no single document which is uniformly acceptable as proof of identity across India – irrespective of age, gender and familial connections. Establishing identity is a challenge for the poor, particularly when they move from place to place as a consequence lack of proof of identity makes it difficult for the poor to access benefits and services.

.....Aadhaar number is an enabler..... The benefits of aadhaar number are:-

"For residents: The aadhaar number will become the single source of identity verification. Once residents enroll, they can use the number multiple times – they would be spared the hassle of repeatedly providing supporting identity documents each time they wish to access services such as obtaining a bank account, passport, driving license, and so on.... the number will also give migrants mobility of identity.



**For Registrars and enrollers:** The UIDAI will only enroll residents after de-duplicating records. This will help Registrars clean out duplicates from their databases, enabling significant efficiencies and cost savings. For Registrars focused on cost, the UIDAI's verification processes will ensure lower Know Your Resident (KYR) costs. For Registrars focused on social goals, a reliable identification number will enable them to broaden their reach into groups that till now, have been difficult to authenticate. The strong authentication that the aadhaar number offers will improve services, leading to better resident satisfaction.

**For Governments:** Eliminating duplication under various schemes is expected to save the Government exchequer a substantial amount. It will also provide Governments with accurate data on residents, enable direct benefit programs, and allow Government departments to coordinate investments and share information".

28. The Ministry have further added that:

"....reason for starting the project is not for overriding existing Ids.....All the above documents are relevant to a domain and for a service. Aadhaar number is to be used as a general proof of identity and proof of address".

#### H. Identity and Eligibility

29. According to a news item dated 7<sup>th</sup> July, 2011, the operationalisation of aadhaar, the unique identification number, will make it possible to link entitlements to targeted beneficiaries. But it will not ensure beneficiaries have been correctly identified. Thus, the old problem of proper identification that bedevils the present system will continue.

30. It has also been brought to the notice of the Standing Committee on Finance that a key issue in targeted welfare schemes is said to be of eligibility and not identity. Government entitlements are unavailable to the poor, primarily due to the eligibility determination process having many loopholes and lacunae. One identity like aadhaar number has nothing to do with such entitlements.

31. Asked to furnish comments, the Ministry of Planning in a written reply have stated that-

"....With aadhaar number integration in various Government schemes, the identity of the beneficiary gets established, by which it is ensured that the government scheme benefits reach the intended beneficiaries. Availability of identity and eligibility information together provides an important tool to plug the loopholes in the eligibility determination process, and in managing the eligibility life cycle for a beneficiary".

32. Dr. Reetika Khera, Expert, while deposing before the Committee has *inter-alia* stated as follows:-

".....exclusion is more on account of poor coverage of these schemes. Say, for instance, in the Public Distribution System, the Planning Commission says that only 'x' per cent of the rural population will get the BPL cards and because of that cap that is set at the Central level, we find that lots of people are excluded".

**I. Aadhaar Number and National Population Register (NPR)**

33. The Standing Committee on Finance, during briefing on the Bill held on 11<sup>th</sup> February, 2011, raised *inter-alia* the issue of possibility of dovetailing the UID exercise with the census operation. In this regard, the Ministry of Planning in their written reply have, among other things, stated as follows:-

" ....the UIDAI is adopting a multiple registrar approach and the Registrar General of India (RGI) will be one of the Registrars of the UIDAI. To synergize the two exercises, an Inter Ministerial Coordination Committee has been set up to minimize duplication. The UIDAI is making all efforts to synergize with National Population Register (NPR) exercise....".

34. According to a news item dated 6<sup>th</sup> September, 2011, the Ministry of Home Affairs said that it would not be preferable to rely entirely on private sector players' for biometric enrolments into the NPR since the population register will form the basis on which citizenship would be determined in the future. Unlike the UIDAI system, the NPR system follows an elaborate procedure to verify and cover the entire population of every area; and the data collected is subjected to 'social vetting'; and accountability can be fixed under the NPR system.

35. In an another news article it has been reported that while registration to the NPR is compulsory and a National Identity Number is linked to each name, the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 does not approve of linking biometrics with personal information. However, according to, the annual reports of the Ministry of Home Affairs, it said that integration of photographs and finger biometrics of 17.2 lakh out of 20.6 lakh records has been completed.

## J. Coordination between the agencies involved in the UID scheme

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36. In a detailed note on the NIDAI Bill, the Ministry of Planning have *inter-alia* submitted that:-

"Implementation of a project of this size is challenging. It involves co-ordination with multiple stakeholders and effective monitoring of implementation at every level....".

37. The Ministry of Finance (Department of Expenditure), however, while commenting on embedding aadhaar numbers in databases to enable interaction have stated that:-

"It must be done urgently by single agency, perhaps NPR. Cabinet has approved (22.7.2010) outlay of Rs. 3,023.01 crore *inter-alia* for assistance for Information Communication Technology (ICT) infrastructure of Rs. 450 crore for integrating/ synergizing Aadhaar numbers with existing databases. Concerned about lack of co-ordination leading to duplication effort and expenditure with at least 6 agencies collecting information (NPR, MNREGA, BPL Census, UID, RSBY and Bank Smart Cards)".

38. It has been reported in a news item dated 3<sup>rd</sup> October, 2011 that the UID project has become focus of the ire of various arms of the government for rather disparate reasons. Asked to furnish the comments on the said news item, the Ministry of Planning have submitted a written reply as follows:-

Views reported in the news item	Comments of the Ministry of Planning
...the Finance Ministry rejected UIDAI's request for Rs.14,000 crore expenditure programme.	It is not correct that the Finance Ministry have rejected the budget expenditure. The proposal for phase III has been recommended by the EFC on 15 September, 2011 after optimizing the cost estimates with certain stipulations to be complied with by the UIDAI to achieve economy of scales, avoid duplication and avail convergence in the programme.
...the planning commission too jumped into the fray, suddenly awakening to the deficiency in the structure and functioning of the Authority.	Aadhaar programme is a complex project of its kind launched first time in the country. EFC is an Inter-Ministerial forum to appraise the proposal rigorously to facilitate decision making by the Competent Authority. Planning Commission is one of the nodal appraising agencies to the EFC forum. On approval by

	<p>Planning Commission some issues regarding design parameters, cost estimates and manner of implementation were emerged, which could not be visualized at project formulation stage. These issues have been deliberated in the EFC meeting and resolved through certain stipulations to be adhered to by UIDAI during execution of the project.</p>
<p>Adding to the confusion were the apparently negative comments made by the Ministry of Home Affairs(MHA) on the flaws in the enrolment process and the security of the biometric data. The Home Ministry's apparently nervous of the UIDAI's efforts to extend its aadhaar enrolment mandate, as the office of the Registrar General of India, an arm of the Ministry, is simultaneously compiling a National Population Register (NPR) which is a comprehensive identity database, as a part of the 2011 census operations currently under way.</p>	<p>While responding to the EFC memo of the UIDAI, the RGI (MHA) have observed as follows:-</p> <p>A security audit of the entire process of UIDAI including enrolment process in UIDAI, the enrolment software, data storage, data management, etc. should be conducted by an appropriate agency.</p> <p>The Comments of the UIDAI on this are:-</p> <p>UIDAI is developing a monitoring and evaluation framework to provide a comprehensive mechanism for continuously monitoring and evaluating the UIDAI program. Considering that a formal structured monitoring and evaluation framework will form the cornerstone for measuring the outcome of UIDAI programme, a distinct component 'Monitoring and evaluation' has been included in the current EFC proposal. Some of the audits planned on a periodic basis are:- (i) Enrolment Client Audit; (ii) Enrolment Process (Field) Audits; (iii) ASDMSA Application Audits; (iv) Authentication User Agency Audits; (v) Data Center Audits; (vi) Security Audits; (vii) Impact Assessment (Grants in Aid for Research); and (viii) Other Third Party Audit Services.</p>
<p>The confusion about the turf of UIDAI and the MHA is rather surprising,</p>	<p>UIDAI has no comments to offer.</p>

<p>given the fact that an EGoM was constituted as early as 2006 to collate the two schemes, namely the NPR and the unique identification number, as aadhaar was then known.</p>	
<p>RBI made the waters murkier by first going against the Finance Ministry notification that was issued in 2010 to permit the use of Know Your Customer (KYC) norms- by limiting the use of aadhaar numbers to -small accounts . It then retracted, by allowing use of aadhaar numbers to all bank accounts without any limitations, but only after again insisting that the banks must satisfy themselves about the current address of the customer. RBI's reluctance to fully accept the aadhaar numbers for the KYC norms is surprising, given that more than a dozen leading banks in the country are partnering with UIDAI to deliver aadhaar numbers to the citizens, and also when the aadhaar number have been accepted by the insurance companies and SEBI for meeting KYC norms.</p>	<p>It is clarified that-</p> <p>(i) aadhaar is sufficient KYC for opening all bank accounts now. This includes no-frill accounts- as per Reserve Bank's circular dated January 27, 2011 – and any bank account as per September 28, 2011 circular.</p> <p>(ii) Banks may ask for additional proof of residence if the current residence is not the same as the address given on the aadhaar document. This procedure is consistent with bank policies applicable to all other officially valid documents including passport, driving license and is not specific to aadhaar.</p>

#### K. Civil Liberties Perspective

39. In a detailed note on the Bill, the Ministry of Planning have stated that issues like access and misuse of personal information, surveillance, profiling, prohibiting other data bases from storing aadhaar numbers; and securing confidentiality of information which is in the registrars domain need to be addressed in larger data protection legislation. In this connection, the Ministry have been asked to comment on the view that the Bill in its current form appears to be unsafe in law as there is no law at present on privacy, and data protection, therefore, it would be appropriate to consider the Bill for legislation only after passing the legislation on privacy, and data protection so as to ensure that there is no conflict between these laws. The Ministry in a written reply have inter-alia stated as under:-

UIDAI has taken appropriate steps to ensure security and protection of data under this law and has incorporated data protection principles within its policy and implementation framework.....

Since appropriate steps have been taken, there is no dependency on the general data protection law.....when the data protection framework comes into place the Authority will follow the same since a national data protection law will apply to all agencies and institutions collecting information.

Collection of information without a privacy law in place does not violate the right to privacy of the individual....There is no bar on collecting information, the only requirement to be fulfilled with respect to the protection of the privacy of an individual is that care should be taken in collection and use of information, consent of individual would be relevant, information should be kept safe and confidential...

.....The proposed Privacy law should also seek to strike a balance between the legitimate demands of protecting individual liberties while recognizing the need for larger public interest to prevail in certain well defined circumstances||

40. Responding to a suggestion received from PRS Legislative Branch that the existence of a unique identifier may facilitate record linkages across separate databases, the Ministry in a written reply have submitted that issues of linking and matching of databases need to be addressed through a data protection legislation which is currently being considered by the Department of Personnel.

41. The National Human Rights Commission (NHRC), on being asked to comment on the implications of the provisions of the Bill on the individual's right to privacy, has inter alia informed the Committee in their post-evidence reply as follows:-

....the right of privacy presupposes that such information relating to an individual which he would not like to share with others will not be disclosed. It may be mentioned that the right of privacy is not an absolute right.....||

42. On the same issue, Dr. Usha Ramanathan, expert, in her post-evidence reply has stated that:-

---The right to dignity, the right to privacy, personal security and safety, the protection against surveillance, are constitutionally protected. The production of a number accompanied by the use of methods such as fingerprinting and iris scanning is even more invasive than is permitted to be applied to alleged offenders. Article 20 (3) provides protection against

compulsory extraction of personal information. Denying services, and rights, to persons because they are unwilling to part with the information in a manner that is more than likely to result in convergence and commodification of their personal information, surveillance, profiling, tagging and tracking is compulsory extraction that clearly reduces the constitutional rights of an ordinary citizen to less than that of an alleged offender. And that this is being done without the protection of law renders the exercise, per se, illegal. Apart from its 'uses', the potential for abuse is undeniable. In a similar context, another court – the Philippines Supreme Court – said: .....the data may be gathered for gainful and useful government purposes; but the existence of this vast reservoir of personal information constitutes a covert invitation to misuse, a temptation that may be too great for some of our authorities to resist[.]

#### L. Financial Implications

##### (i) Feasibility Study

43. The Ministry of Planning in a detailed note on the Bill have stated that aadhaar number is cost-effective compared to other alternate targeted solutions to the problems identified in delivering services and benefits such as eliminating duplicate and fake identities. The Detailed Project Report (DPR) of the UID scheme has been prepared and submitted by M/s. Ernst & Young Pvt.Ltd. in April, 2011.

44. Asked whether any committee has been set up to study the financial implications of the UID scheme; and also to furnish the details of feasibility study carried out, if any, covering all aspects of the UID scheme such as setting up of the proposed NIDAI, and cost-benefit analysis, the Ministry in a written reply have, among other things, submitted that:-

-No committee has been set up to study the financial implications of the UID scheme. As per laid down guidelines/procedure the Expenditure Finance Committee (EFC) reviews project proposals and its financial implications wherein the views of all stakeholders/ministries are taken in to account...

.....deliberations were held with all relevant stakeholders including Planning Commission, Registrar General of India, Election Commission of India, Ministry of Rural Development, Ministry of Urban Development and State Governments. A Proof of Concept study was undertaken in the States of Gujarat, Karnataka, U.P. and Orissa in four rural and one urban locations to establish the feasibility of linking UID with partner-databases and to validate the possibility of one-time linkage which once

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established would be maintained on an ongoing basis by the UIDAI. An assessment study was carried out in 10 Central Ministries and their respective departments in four states (Karnataka, Uttar Pradesh, Gujarat and West Bengal".

**(ii) Estimated cost of the UID scheme**

45. The UID scheme is a Central Sector Scheme. The estimated cost of the Phase-I and Phase-II of the scheme spread over five years is Rs.3170.32 crore (Rs.147.31 crore for Phase-I and Rs.3023.01 crore for Phase-II). The estimated cost includes scheme components for issue of 10 crore UID numbers by March, 2011 and recurring establishment costs for the entire scheme up to March, 2014. The Budget for Phase-III of the scheme to the tune of Rs.8861 crore has been approved.

46. According to news items, the total cost of the UID scheme may run up to Rs. 1,50,000 crore. Even after the commitment of such levels of expenditures, the uncertainty over the technological options and ultimate viability of the scheme remains.

**(iii) Comparative cost of aadhaar number and existing ID documents**

47. Asked to furnish the details of comparative cost of existing ID documents (per individual), namely, Voter Id card, PAN card, driving license and aadhaar number, the Ministry has *inter-alia* informed the Committee in a written reply that the comparative costs of the documents mentioned above are not available.

**(iv) Funding of other biometric projects**

48. It is noticed that a project namely, Bharatiya - Automated Finger Print Identification System (AFSI), was launched in January, 2009, being funded by the Department of Information Technology, Ministry of Communications and Information Technology, for collection of biometric information of the people of the country.

49. Asked to clarify as to whether the biometric information (finger prints) being collected under the Bharatiya – AFSI project could also be used by the UIDAI, the Ministry have submitted that-



"The biometrics required for the aadhaar project are iris, ten finger prints and photograph. To ensure uniqueness of the individual, it is essential that the biometrics captured are as per the specifications laid down by the Biometrics Standards Committee. The quality, nature and manner of collection of biometric data by other biometric projects may not be of the nature that can be used for the purpose of the aadhaar scheme and hence it may not be possible to use the fingerprints captured under the Bhartiya-AFSI project".

**(v) Revenue model of the UIDAI**

50. According to a detailed note on the bill furnished by the Ministry of Planning, demographic data and address verification will be provided free of cost till a separate pricing policy is announced in due course.

51. However, in a news item dated 6<sup>th</sup> September, 2011, it has been reported that the Ministry of Home Affairs pointed out uncertainties in the UIDAI's revenue model.

**M. Technology**

52. The Biometrics Standards Committee set up by the UIDAI has recognized in its report that a fingerprints-based biometric system shall be at the core of the UIDAI's de-duplication efforts. It has further noted that it is:

"...conscious of the fact that de-duplication of the magnitude required by the UIDAI has never been implemented in the world. In the global context, a de-duplication accuracy of 99% has been achieved so far, using good quality fingerprints against a database of up to fifty million. Two factors however, raise uncertainty about the accuracy that can be achieved through fingerprints. First, retaining efficacy while scaling the database size from fifty million to a billion has not been adequately analyzed. Second, fingerprint quality, the most important variable for determining de-duplication accuracy, has not been studied in depth in the Indian context".

53. Asked to explain the reliability of technical architecture of the UID scheme, the Ministry of Planning in a detailed note on the NIDAI Bill have, among other things, stated as follows:-

"The UID project is a complex technology project. Nowhere in the world has such a large biometric database of a billion people being maintained. The frontiers of technology in biometrics are being tested and used in the project.....

The technical architecture of the UID scheme is at this point, is based on high-level assumptions. The architecture has been structured to

ensure clear data verification, authentication and de-duplication, while ensuring a high level of privacy and information security.....

The project team is learning and adapting to the challenges and ensuring that the solutions that are being offered are the best in the world to achieve the task....".

54. Further asked as to given the high degree of assumptions on the reliability of technology adopted by the UIDAI and probability of system failures of different degrees, whether incurring huge costs on the UID scheme is prudent and affordable, the Ministry have stated in a written reply, among other things, as follows:-

".....UIDAI is cognizant of the fact that biometric matching (which is a patterns matching) by its very nature will suffer from inaccuracy. However, these inaccuracy levels are less than 1%. This cannot be a reason for not attempting to use the technology.

It is well acknowledged that there will be failures in authentication for various reasons. After Proof of Concept studies on authentication, appropriate policies and processes will be developed to take care of situations where failure occurs for various reasons.....The choice of using the authentication services is left to the third party service provider.....Concerned agencies will have to develop policies and procedures to handle such exceptional situations....."

55. In a news article, one of the representatives of the UIDAI has admitted that the quality of fingerprints is bad because of the rough exterior of fingers caused by hardwork, and this poses a challenge for later authentication.

#### **N. National Security vs the UID scheme**

##### **(i) Illegal residents**

56. A concern over the possibility of illegal residents getting aadhaar numbers, and the safeguards in this regard has been raised by the Standing Committee on Finance during the sitting held on 11 February, 2011. In a written reply, the Ministry of Planning have stated as under:-

"Aadhaar number is not a proof of citizenship or domicile [Clause 6 of the Bill]. It only confirms identity and that too subject to authentication [Clause 4(3)]. This is clearly mandated in the NIDAI Bill and the communication being sent to the resident.

It is the responsibility of the Registrars to enroll a resident after due verification as per the procedure laid down by the UIDAI. If a person is not a resident as per the Bill, the Authority is being vested with the power

to omit/deactivate the aadhaar number [Clause 23 (2) (g)]. Subsequent attempts to enter the system can be detected”.

**(ii) Involvement of Private agencies**

57. On the issue of security of proposed data of UIDAI, an unstarred question (no.2989) was raised in Rajya Sabha. The Minister of State in the Ministry of Planning and Minister of State in the Ministry of Parliamentary Affairs tabled the answer to the above said question in Rajya Sabha on 22 April, 2010 as follows:-

“National Informatics Centre (NIC) had pointed out that the issues relating to privacy and security of UID data, in case the data is not hosted in a Government data centre may be taken into consideration.

UIDAI is of the opinion that the hosting of data in a private data centre does not necessarily lead to a violation of privacy or security. Appropriate contractual arrangement shall be put in place with the data centre space provider to ensure security and privacy of the data.

At present, UIDAI does not have its own permanent facility to house its data centre. Therefore, 75 sq.ft of data centre space has been hired from M/s. ITI Ltd. for proof of concept and pilot on a rental basis”.

58. The Ministry of Home Affairs, according to a news item, have questioned the security of citizens’ biometric data in UIDAI’s ‘outsourced service oriented infrastructure’ model.

59. To a specific query as to could outside agencies be allowed to partake in the UID scheme when doubts have been expressed on possible compromise with the interests of the national security, the Ministry of Planning in a written reply have *inter alia* stated that:-

“....the UIDAI has followed government procurement process and engaged the appropriate agencies for the implementation of the UID scheme....The UIDAI has also implemented a comprehensive information security policy.....”

60. It is, however, reported in various news articles as late as dated 26<sup>th</sup> November, 2011 that controversies between the Ministry of Home Affairs and the UIDAI over the issues such as manner and processes followed by the UIDAI, duplication of efforts between National Population Register and aadhaar, and security of data remain unresolved.

## PART – II

## OBSERVATIONS / RECOMMENDATIONS

1. The Committee have carefully examined the written information furnished to them and heard the views for and against the National Identification Authority of India (NIDAI) Bill from various quarters such as the Ministry of Planning, the Unique Identification Authority of India (UIDAI), the National Human Rights Commission (NHRC) and experts. The clearance of the Ministry of Law & Justice for issuing aadhaar numbers, pending passing the Bill by Parliament, on the ground that powers of the Executive are co-extensive with the legislative power of the Government and that the Government is not debarred from exercising its Executive power in the areas which are not regulated by the legislation does not satisfy the Committee. The Committee are constrained to point out that in the instant case, since the law making is underway with the bill being pending, any executive action is as unethical and violative of Parliament's prerogatives as promulgation of an ordinance while one of the Houses of Parliament being in session.

2. The Committee are surprised that while the country is on one hand facing a serious problem of illegal immigrants and infiltration from across the borders, the National Identification Authority of India Bill, 2010 proposes to entitle every resident to obtain an aadhaar number, apart from entitling such other category of individuals as may be notified from time to time. This will, they apprehend, make even illegal immigrants entitled for an aadhaar number. The Committee are unable to understand the rationale of expanding the scheme to persons who are not citizens, as this entails numerous benefits proposed by the Government. The Committee have received a number of suggestions for restricting the scope of the UID scheme only to the citizens and for considering better options available with the Government by issuing Multi-Purpose National Identity Cards (MNICs) as a more acceptable alternative.

3. The Committee observe that *prima facie* the issue of unique identification number, which has been referred to as “aadhaar number” to individuals residing in India and other classes of individuals under the Unique Identification (UID) Scheme is riddled with serious lacunae and concern areas which have been identified as follows:-

- (a) The UID scheme has been conceptualized with no clarity of purpose and leaving many things to be sorted out during the course of its implementation; and is being implemented in a directionless way with a lot of confusion. The scheme which was initially meant for BPL families has been extended for all residents in India and to certain other persons. The Empowered Group of Ministers (EGoM), constituted for the purpose of collating the two schemes namely, the UID and National Population Register(NPR), and to look into the methodology and specifying target for effective completion of the UID scheme, failed to take concrete decision on important issues such as (a) identifying the focused purpose of the resident identity database; (b) methodology of collection of data; (c) removing the overlapping between the UID scheme and NPR; (d) conferring of statutory authority to the UIDAI since its inception; (e) structure and functioning of the UIDAI; (f) entrusting the collection of data and issue of unique identification number and national identification number to a single authority instead of the present UIDAI and its reconciliation with National Registration Authority;
- (b) The need for conferring of statutory authority to the UIDAI felt by the Government way back in November, 2008, but was deferred for more than two years for no reason. In this regard, the Ministry of Planning have informed the Committee that till the time Parliament passes the NIDAI Bill, crucial matters impinging

on security and confidentiality of information will be covered by the relevant laws. The Committee are at a loss to understand as to how the UIDAI, without statutory power, could address key issues concerning their basic functioning and initiate proceedings against the defaulters and penalize them;

- (c) The collection of biometric information and its linkage with personal information of individuals without amendment to the Citizenship Act, 1955 as well as the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, appears to be beyond the scope of subordinate legislation, which needs to be examined in detail by Parliament;
  - (d) Continuance of various existing forms of identity and the requirement of furnishing 'other documents' for proof of address, even after issue of aadhaar number, would render the claim made by the Ministry that aadhaar number is to be used as a general proof of identity and proof of address meaningless;
  - (e) In addition to aadhaar numbers being issued by the UIDAI, the issuance of smart cards containing information of the individuals by the registrars is not only a duplication but also leads to ID fraud as prevalent in some countries; and
  - (f) The full or near full coverage of marginalized sections for issuing aadhaar numbers could not be achieved mainly owing to two reasons *viz.* (i) the UIDAI doesn't have the statistical data relating to them; and (ii) estimated failure of biometrics is expected to be as high as 15% due to a large chunk of population being dependent on manual labour.
4. The Committee regret to observe that despite the presence of serious difference of opinion within the Government on the UID scheme as illustrated below, the scheme continues to be implemented in an

overbearing manner without regard to legalities and other social consequences:-

- (i) The Ministry of Finance (Department of Expenditure) have expressed concern that lack of coordination is leading to duplication of efforts and expenditure among at least six agencies collecting information (NPR, MGNREGS, BPL census, UIDAI, RSBY and Bank Smart Cards);
- (ii) The Ministry of Home Affairs are stated to have raised serious security concern over the efficacy of introducer system, involvement of private agencies in a large scale in the scheme which may become a threat to national security; uncertainties in the UIDAI's revenue model;
- (iii) The National Informatics Centre (NIC) have pointed out that the issues relating to privacy and security of UID data could be better handled by storing in a Government data centre;
- (iv) The Ministry of Planning have expressed reservation over the merits and functioning of the UIDAI; and the necessity of collection of iris image;
- (v) Involvement of several nodal appraising agencies which may work at cross-purpose; and
- (vi) Several Government agencies are collecting biometric(s) information in the name of different schemes.

5. The Committee are also unhappy to observe that the UID scheme lacks clarity on many issues such as even the basic purpose of issuing "aadhaar" number. Although the scheme claims that obtaining aadhaar number is voluntary, an apprehension is found to have developed in the minds of people that in future, services / benefits including food entitlements would be denied in case they do not have aadhaar number.

It is also not clear as to whether possession of aadhaar number would be made mandatory in future for availing of benefits and services. Even if the aadhaar number links entitlements to targeted beneficiaries, it may not ensure that beneficiaries have been correctly identified. Thus, the present problem of proper identification would persist.

It is also not clear that the UID scheme would continue beyond the coverage of 200 million of the total population, the mandate given to the UIDAI. In case, the Government does not give further mandate, the whole exercise would become futile.

6. Though there are significant differences between the identity system of other countries and the UID scheme, yet there are lessons from the global experience to be learnt before proceeding with the implementation of the UID scheme, which the Ministry of Planning have ignored completely. For instance, the United Kingdom shelved its Identity Cards Project for a number of reasons, which included:- (a) huge cost involved and possible cost overruns; (b) too complex; (c) untested, unreliable and unsafe technology; (d) possibility of risk to the safety and security of citizens; and (e) requirement of high standard security measures, which would result in escalating the estimated operational costs. In this context, the Report of the London School of Economics' Report on UK's Identity Project *inter-alia* states that ".....identity systems may create a range of new and unforeseen problems.....the risk of failure in the current proposals is therefore magnified to the point where the scheme should be regarded as a potential danger to the public interest and to the legal rights of individuals". As these findings are very much relevant and applicable to the UID scheme, they should have been seriously considered.

7. The UID scheme facilitates the UIDAI and the registrars to create database of information of people of the country. Considering the huge database size and possibility of misuse of information, the Committee are



of the view that enactment of national data protection law, which is at draft stage with the Ministry of Personnel, Public Grievances and Pensions, is a pre-requisite for any law that deals with large scale collection of information from individuals and its linkages across separate databases. In the absence of data protection legislation, it would be difficult to deal with the issues like access and misuse of personal information, surveillance, profiling, linking and matching of data bases and securing confidentiality of information etc.

8. The Committee note that the Ministry of Planning have admitted that (a) no committee has been constituted to study the financial implications of the UID scheme; and (b) comparative costs of the aadhaar number and various existing ID documents are also not available. The Committee also note that Detailed Project Report (DPR) of the UID Scheme has been done much later in April, 2011. The Committee thus strongly disapprove of the hasty manner in which the UID scheme has been approved. Unlike many other schemes / projects, no comprehensive feasibility study, which ought to have been done before approving such an expensive scheme, has been done involving all aspects of the UID scheme including cost-benefit analysis, comparative costs of aadhaar number and various forms of existing identity, financial implications and prevention of identity theft, for example, using hologram enabled ration card to eliminate fake and duplicate beneficiaries.

9. The Committee are afraid that the scheme may end up being dependent on private agencies, despite contractual agreement made by the UIDAI with several private vendors. As a result, the beneficiaries may be forced to pay over and above the charges to be prescribed by the UIDAI for availing of benefits and services, which are now available free of cost.

10. The Committee find that the scheme is full of uncertainty in technology as the complex scheme is built up on untested, unreliable technology and several assumptions. Further, despite adverse observations by the UIDAI's Biometrics Standards Committee on error rates of biometrics, the UIDAI is collecting the biometric information. It is also not known as to whether the proof of concept studies and assessment studies undertaken by the UIDAI have explored the possibilities of maintaining accuracy to a large level of enrolment of 1.2 billion people. Therefore, considering the possible limitations in applications of technology available now or in the near future, the Committee would believe that it is unlikely that the proposed objectives of the UID scheme could be achieved.

11. The Committee feel that entrusting the responsibility of verification of information of individuals to the registrars to ensure that only genuine residents get enrolled into the system may have far reaching consequences for national security. Given the limitation of any mechanism such as a security audit by an appropriate agency that would be setup for verifying the information etc., it is not sure as to whether complete verification of information of all aadhaar number holders is practically feasible; and whether it would deliver the intended results without compromising national security. As the National Identity Cards to citizens of India are proposed to be issued on the basis of aadhaar numbers, the possibility of possession of aadhaar numbers by illegal residents through false affidavits / introducer system cannot be ruled out.

12. The Committee take note that the Ministry of Home Affairs have alleged that some of the registrars have not adhered to the laid down procedures under UIDAI which renders the Memoranda of Understanding (MoU) signed between the UIDAI and the registrars meaningless; and it compromises the security and confidentiality of information of aadhaar

number holders. Even, according to the latest media reports, controversies between the Ministry of Home Affairs and the UIDAI over issues such as the manner and processes followed by the UIDAI, duplication of efforts between NPR and aadhaar, and security of data still remain unresolved.

13. In view of the afore-mentioned concerns and apprehensions about the UID scheme, particularly considering the contradictions and ambiguities within the Government on its implementation as well as implications, the Committee categorically convey their unacceptability of the National Identification Authority of India Bill, 2010 in its present form. The data already collected by the UIDAI may be transferred to the National Population Register (NPR), if the Government so chooses. The Committee would, thus, urge the Government to reconsider and review the UID scheme as also the proposals contained in the Bill in all its ramifications and bring forth a fresh legislation before Parliament.

New Delhi  
11 December, 2011  
20 Agrahayana, 1933 (Saka)

YASHWANT SINHA  
Chairman,  
Standing Committee on Finance

**NOTE OF DISSENT**

Appendix I

205

Shri Raashid Alvi, MP

I do not agree with the paragraph "13" of the draft Report on "The National Identification Authority of India Bill, 2010".

I suggest to delete "this para".

Dated: 7 December, 2011

Sd/-  
(RAASHID ALVI)

## NOTE OF DISSENT

206

Prem Das Rai, MP

The National Identification Authority of India Bill, 2010

At the outset I do not believe that the bill should be rejected in the manner it has been. Since I have been inducted into the Committee recently I do not have the inputs that went in when the stakeholders and other Government departments were giving witness. I also do not know whether we gave enough time to the UID implementers to give evidence and present their point of view.

Hence, I would like to place on record that the issue of giving out Aadhaar numbers under the UID scheme, I believe, is one of the greatest import for social and economic inclusion in this country. I personally am privy to the kind of work that is needed at the grassroots as I was part of an organisation that did such work in the North East of India and other backward regions using some form of technology to bring in inclusion.

The linking of a person to a number and then being able to make give access to the right to that person is transformational. It is the next phase of transformation that technology can bring about in our own country. This has never been done anywhere in the world and we should be rightly proud of this.

I do agree there may be serious issues that need to be factored in which my esteemed colleagues have pointed out.

I recommend that the Bill may be discussed in Parliament bringing about some of the changes so desired and do not concur that the Bill be brought fresh.

Sd/-

Dated: 8 December, 2011

(PREM DAS RAI)

## NOTE OF DISSENT

207

Manicka Tagore, MP

I could not attend this meeting on adoption of the draft report on the National Identification Authority of India Bill, 2010 because a very important discussion on the price rise was going on in the Lok Sabha. The Govt. of India with a view to ensure that the benefits of centrally sponsored schemes reaches to right persons and not misused, they had decided to issue unique identification numbers to all residents in India and to certain other persons the basic idea was to identification of the persons. The Adhar programme has been launched first time in India. The UIDAI officials had taken all possible precautions to make the exercise safe and secure. Both demographic and biometric datas were collected and its method of collecting datas were approved by the Demofic Standard and Verification Procedure Committee.

It is surprising to know that the committee members have not yet recognized the value of UID. This system will cut down fraud and corruption in every area of administration.

I dissent the observation and recommendation of the Standing Committee on Finance regarding the Draft Report on the National Identification Authority of India Bill, 2010. I request the Chairman that the UID bill may kindly be considered by the Government with our views and not rejected.

Dated 10 December, 2011

Sd/-  
(MANICKA TAGORE)

## NOTE OF DISSENT

208

Magunta Sreenivasulu Reddy, MP

I am writing this letter as a Dissent Note to the Draft Report on the National Identification of India Bill, 2010 which was adopted in the meeting held on 8.12.11. I could not attend the meeting fully since I was required to attend to Lok Sabha proceedings as my Congress Party had issued a Three Line Whip for 8.12.11 and left after signing.

After the meeting having gone into the matter again, I understand the Standing Committee have adopted the Draft Report with the recommendation as:

"considering the contradictions and ambiguities within the Government on its implementation as well as implications, the Committee categorically convey their unacceptability of the National Identification Authority of India Bill, 2010 in its present form. The Committee would, thus, urge the Government to reconsider and review the UID Scheme as also the proposals contained in the Bill in all its ramifications and bring forth a fresh legislation before Parliament."

I personally feel that instead the Bill may be considered in all its merits and the Draft Report may be modified accordingly. More extensive deliberations are therefore required to examine the Bill more thoroughly. This may therefore be treated as my Dissent Note to the Draft Report.

Dated 14 December, 2011

Sd/-  
(MAGUNTA SREENIVASULU REDDY)

## MINUTES OF THE THIRTEENTH SITTING OF THE STANDING COMMITTEE ON FINANCE (2010-11)

The Committee sat on Friday, the 11<sup>th</sup> February, 2011 from 1130 hrs to 1400 hrs.

### PRESENT

**Shri Yashwant Sinha – Chairman**

### MEMBERS

#### LOK SABHA

2. Shri Bhartruhari Mahtab
3. Smt. Jaya Prada Nahata
4. Shri Rayapati Sambasiva Rao
5. Dr. Kavuru Sambasiva Rao
6. Shri Manicka Tagore

#### RAJYA SABHA

7. Shri S.S. Ahluwalia
8. Shri Raashid Alvi
9. Shri Piyush Goyal
10. Shri Moinul Hassan

#### SECRETARIAT

- |                                 |   |                     |
|---------------------------------|---|---------------------|
| 1. Shri A. K. Singh             | – | Joint Secretary     |
| 2. Shri T. G. Chandrasekhar     | – | Additional Director |
| 3. Shri Ramkumar Suryanarayanan | – | Deputy Secretary    |
| 4. Smt. B. Visala               | – | Deputy Secretary    |

### WITNESSES

#### Ministry of Planning

1. Ms. Sudha Pillai, Member-Secretary
2. Shri Pronab Sen, Pr. Adviser
3. Shri Chaman Kumar, Addl. Secretary & FA
4. Shri C. Muralikrishna Kumar, Sr. Adviser
5. Shri T.K. Pandey, Joint Secretary (Admn.)

#### Unique Identification Authority of India (UIDAI)

1. Shri Nandan Nilekani, Chairman
2. Shri R.S. Sharma, Director-General



2. The Committee took evidence of the representatives of the Ministry of Planning and Unique Identification Authority of India (UIDAI) in connection with the examination of the National Identification Authority of India Bill, 2010. Major issues discussed with the representatives included, need for providing statutory status to the Unique Identification Authority of India (UIDAI); Definition of 'Resident'; provision for de-activating the Aadhaar Number; collection of demographic information and biometric information; nature of enrolment and special measures for enrolment of weaker sections. The Chairman directed the representatives to furnish replies to the points raised during the sitting within one week.

The witnesses then withdrew.

A verbatim record of proceedings was kept.

The Committee then adjourned.

**MINUTES OF THE NINETEENTH SITTING OF THE STANDING COMMITTEE ON FINANCE  
(2010-11)**

The Committee sat on Wednesday, the 29<sup>th</sup> June, 2011 from 1130 hrs to 1400 hrs.

**PRESENT**

**Shri Bhartruhari Mahtab** – **Acting Chairman**

**MEMBERS**

**LOK SABHA**

2. Shri C.M. Chang
3. Shri Bhakta Charan Das
4. Shri Gurudas Dasgupta
5. Shri Nishikant Dubey
6. Shri Mangani Lal Mandal
7. Shri Magunta Sreenivasulu Reddy
8. Dr. Kavuru Sambasiva Rao
9. Shri Sarvey Sathyanarayana
10. Shri Dharam Singh

**RAJYA SABHA**

11. Shri S.S. Ahluwalia
12. Shri Raashid Alvi
13. Shri Moinul Hassan

**SECRETARIAT**

- |                              |   |                     |
|------------------------------|---|---------------------|
| 1. Shri A. K. Singh          | – | Joint Secretary     |
| 2. Shri R.K. Jain            | – | Director            |
| 3. Shri T. G. Chandrasekhar  | – | Additional Director |
| 4. Shri Kulmohan Singh Arora | – | Under Secretary     |

**Part I**

**(1130 hrs. to 1145 hrs.)**

2. In the absence of the Chairman, the Committee chose Shri Bhartruhari Mahtab, M.P. to chair the sitting under Rule 258(3) of the Rules of Procedure.

3.           XX           XX           XX           XX.
- XX           XX           XX           XX.

**Part II**

(1145 hrs. to 1215 hrs.)

**WITNESSES****National Human Rights Commission (NHRC)**

- |    |                   |   |                       |
|----|-------------------|---|-----------------------|
| 1. | Shri Rajiv Sharma | - | Secretary-General     |
| 2. | Shri A.K. Garg    | - | Registrar (Law)       |
| 3. | Shri J.P. Meena   | - | Joint Secretary (P&A) |

4. The Committee heard the representatives of the National Human Rights Commission on "The National Identification Authority of India Bill, 2010". The major issues discussed during the sitting broadly related to nature, objective and beneficiaries of aadhaar number; possible discrimination and specific provisions that are required to be built in; safeguards needed for securing the stored information by the proposed National Identification Authority of India; implications of the provisions of the Bill on the individual's right to privacy, etc. The Chairman directed the representatives of the National Human Rights Commission to furnish replies to the points raised by the Members during the discussion within a week.

The witnesses then withdrew.

**Part III**

(1215 hrs. to 1300 hrs.)

**WITNESSES****Indian Banks' Association (IBA)**

- |    |                     |   |                     |
|----|---------------------|---|---------------------|
| 1. | Shri M.D. Mallya    | - | Chairman            |
| 2. | Dr. K. Ramakrishnan | - | Chief Executive     |
| 3. | Shri M.R. Umarji    | - | Chief Advisor-Legal |

5. Subsequently, the Committee heard the representatives of the Indian Banks' Association (IBA) on "The National Identification Authority of India Bill, 2010". The major issues discussed during the sitting broadly related to stipulations prescribed by the Ministry of Finance and the Reserve Bank of India for using aadhaar numbers for opening bank accounts; new account holders added through aadhaar numbers; and utility of aadhaar number in financial inclusion, social sector lending, etc. The Chairman directed the

representatives of Indian Banks' Association (IBA) to furnish replies to the points raised by the Members during the discussion within a week.

213

The witnesses then withdrew.

#### **Part IV**

**(1300 hrs. to 1400 hrs.)**

#### **WITNESS**

Dr. Reetika Khera, Visitor, Centre for Development Economics, Delhi School of Economics

6. The Committee then heard Dr. Reetika Khera, on "The National Identification Authority of India Bill, 2010". The major issues discussed broadly related to nature of Aadhaar number; existing ID proof documents and need for aadhaar number; usage and benefits of aadhaar number particularly in Mahatama Gandhi National Rural Employment Guarantee Scheme, Public Distribution System, implications of the UID programme; relevance of Report of London School of Economics on UK's Identity Act 2006 in the context of aadhaar number etc. The Chairman directed the expert to furnish replies to the points raised by the Members during the discussion within a week.

A verbatim record of the proceedings was kept.

The witness then withdrew

The Committee then adjourned at 1400 hours.

**MINUTES OF THE TWENTY-SECOND SITTING OF THE STANDING COMMITTEE ON FINANCE (2010-11)**

The Committee sat on Friday, the 29<sup>th</sup> July, 2011 from 1100 hrs to 1715 hrs.

**PRESENT**

**Shri Yashwant Sinha** – **Chairman**

**MEMBERS**

**LOK SABHA**

2. Dr. Baliram (Lalganj)
3. Shri C.M. Chang
4. Shri Gurudas Dasgupta
5. Shri Nishikant Dubey
6. Shri Bhartruhari Mahtab
7. Shri Mangani Lal Mandal
8. Dr. Kavuru Sambasiva Rao
9. Shri Manicka Tagore

**RAJYA SABHA**

10. Shri S.S. Ahluwalia
11. Shri Raashid Alvi
12. Shri Moinul Hassan
13. Shri Satish Chandra Misra
14. Shri Mahendra Mohan
15. Dr. Mahendra Prasad
16. Dr. K.V.P. Ramachandra Rao

**SECRETARIAT**

- |                                 |   |                  |
|---------------------------------|---|------------------|
| 1. Shri A. K. Singh             | – | Joint Secretary  |
| 2. Shri R.K. Jain               | – | Director         |
| 3. Shri Ramkumar Suryanarayanan | – | Deputy Secretary |
| 4. Shri Kulmohan Singh Arora    | – | Under Secretary  |

**Part I**

**(1100 hrs. to 1130 hrs.)**

2.	XX	XX	XX	XX.
.	XX	XX	XX	XX.

**Part II**

**(1130 hrs. to 1300 hrs.)**

**WITNESSES**

3.	XX	XX	XX	XX.
.	XX	XX	XX	XX.

The witnesses then withdrew.

**Part III**  
**(1400 hrs. to 1715 hrs.)**

**WITNESSES**

**Confederation of Indian Industry (CII)**

1. Mr Arun Duggal,  
Vice Chairman, International Asset Reconstruction Company (IARC)  
and Chairman Shriram Capital Limited
2. Mr Chirag Jain,  
Chief Operating Officer  
Canara HSBC Oriental Bank of Commerce Life Insurance Company Limited
3. Mr Ravi Gandhi,  
VP, Corporate Regulatory Affairs  
Bharti Airtel
4. Mr Rameesh Kailasam,  
Program Director  
IBM India Pvt. Limited

4. The Committee heard the representatives of Confederation of Indian Industry (CII) in connection with examination of 'The National Identification Authority of India Bill, 2010'. The major issues discussed included, existing ID proof documents and the rationale and necessity of aadhaar number; usage, benefits and objects of aadhaar number; role of aadhaar number in planning and formulation of social policies; collection of biometric and demographic information; measures for enrolment of certain categories like persons with disability; exploration of alternate and economical identity system; opening up of Registrars and enrolment agencies to private sector; technological issues involved in the UID project; financial implications of the UID project; impact of the provisions of the Bill on the individual's right to privacy; potential of possible use of aadhaar numbers by illegal residents; lessons learnt from global practice and failures experienced in different countries in establishment of identity system similar to aadhaar number especially relevance of report of London School of Economics on UK Identity Act, 2006; legality of implementation of the UID project before the law is enacted by the Parliament;

making the penal provisions of the Bill in line with IT Act, 2000 etc. The Chairman directed the representatives of Confederation of Indian Industry (CII) to give suggestions clause-by-clause along-with the replies to the points raised by the Members within ten days.

The witnesses then withdrew.

## WITNESSES

### Experts

1. Dr. Usha Ramanathan,  
Independent Law Researcher on the jurisprudence on Law,  
Poverty and Rights, New Delhi
2. Dr. R. Ramakumar,  
Associate Professor,  
Tata Institute of Social Sciences, Mumbai
3. Shri Gopal Krishna,  
Member, Citizen Forum for Civil Liberties, New Delhi

5. The Committee then heard the experts on "The National Identification Authority of India Bill, 2010". The major issues discussed broadly related to beneficiaries of aadhaar number including the eligibility of children; feasibility study on the UID project; costs and benefits analysis of the UID project; global experience in creation of a national data base of its citizens with biometrics; convergence of data, its usage and its consequences; functioning of the UIDAI under Executive order and implementation of the UID project before an enactment of law; impact of the provisions of the Bill on civil rights and liberties; implications of the provisions of the Bill on RTI Act, 2005; responsibilities of 'Introducer' and liability of the UIDAI; outsourcing of works by the UIDAI and its responsibilities; alternate system of identification etc. The Chairman directed the experts to furnish replies to the points raised by the Members during the discussion within ten to fifteen days.

A verbatim record of the proceedings was kept.

The witnesses then withdrew

The Committee then adjourned

**Minutes of the Sixth sitting of the Standing Committee on Finance (2011-12)**

The Committee sat on Thursday, the 08<sup>th</sup> December, 2011 from 1500 hrs. to 1615 hrs.

**PRESENT**

**Shri Yashwant Sinha – Chairman**

**MEMBERS**

**LOK SABHA**

2. Shri Shivkumar Udasi Chanabasappa
3. Shri Harishchandra Deoram Chavan
4. Shri Bhakta Charan Das
5. Shri Nishikant Dubey
6. Shri Chandrakant Khaire
7. Shri Bhartruhari Mahtab
8. Shri Prem Das Rai
9. Dr. Kavuru Sambasiva Rao
10. Shri Rayapati S. Rao
11. Shri Magunta Sreenivasulu Reddy
12. Shri G.M. Siddeswara
13. Shri Yashvir Singh
14. Shri R. Thamaraiselvan
15. Dr. M. Thambidurai

**RAJYA SABHA**

16. Shri S.S. Ahluwalia
17. Shri Raashid Alvi
18. Shri Vijay Jawaharlal Darda
19. Shri Moinul Hassan
20. Shri Satish Chandra Misra
21. Shri Mahendra Mohan
22. Dr. Mahendra Prasad
23. Dr. K.V.P. Ramachandra Rao
24. Shri Yogendra P. Trivedi

**SECRETARIAT**

- |                                 |   |                  |
|---------------------------------|---|------------------|
| 1. Shri A. K. Singh             | – | Joint Secretary  |
| 2. Shri R.K. Jain               | – | Director         |
| 3. Shri Ramkumar Suryanarayanan | – | Deputy Secretary |



2. The Committee took up the following draft Reports for consideration and adoption:-

- (i) The Insurance Laws (Amendment) Bill, 2008;
- (ii) The National Identification Authority of India Bill, 2010; and
- (iii) The Banking Laws (Amendment) Bill, 2011.

3. The Committee adopted the above draft reports with some minor modifications/changes as suggested by Members. The Committee authorised the Chairman to finalise the Reports in the light of the modifications suggested and present these Reports to Parliament.

The Committee then adjourned

# Template Aging in Iris Biometrics: Evidence of Increased False Reject Rate in ICE 2006

Sarah E. Baker, Kevin W. Bowyer, Patrick J. Flynn and P. Jonathon Phillips

**Abstract** Using a data set with approximately four years of elapsed time between the earliest and most recent images of an iris (23 subjects, 46 irises, 6,797 images), we investigate template aging for iris biometrics. We compare the match and non-match distributions for short-time-lapse image pairs, acquired with no more than 120 days of time lapse between them, to the distributions for long-time-lapse image pairs, with at least 1,200 days of time lapse. We find no substantial difference in the non-match, or impostor, distribution between the short-time-lapse and the long-time-lapse data. We do find a difference in the match, or authentic, distributions. For the image dataset and iris biometric systems used in this work, the false reject rate increases by about 50% or greater for the long-time-lapse data relative to the short-time-lapse data. The magnitude of the increase in the false reject rate varies with changes in the decision threshold, and with different matching algorithms. Our results demonstrate that iris biometrics is subject to a template aging effect.

## 1 Introduction

The term "template aging" refers to degradation of biometric performance that occurs with increased time between the acquisition of an enrollment image and acqui-

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sition of the image compared to the enrollment. Template aging effects are known to exist for biometrics such as face and fingerprint [7][28][31][19][27].

The iris biometrics community has long accepted the premise that the iris is "essentially stable" throughout a person's life, and that this means that template aging does not occur for iris biometrics. Daugman stated the core assumption this way - "As an internal (yet externally visible) organ of the eye, the iris is well protected and stable over time"[8]. This assumption is commonly repeated in research publications dealing with iris biometrics: "[the iris is] stable over an individual's lifetime"[30], "[the iris is] essentially stable over a lifetime"[22], "the iris is highly stable over a person's lifetime"[24]. The commercial iris biometrics literature explicitly connects this to the idea of lifetime enrollment - "only a single enrollment in a lifetime"[17].

Note that claims about stability of the iris texture and "lifetime enrollment" are never presented as dependent on the particular sensor, algorithm, length of time lapse or any other condition. They are presented as universal claims about iris biometrics in general. Thus a single counter-example is sufficient to disprove the universal claim.

It is well known in the medical literature that the eye and iris undergo a variety of changes with age [2][5][12][23][33][34]. Any of these effects could in principle alter details of the imaged iris texture. It is also possible that a template aging effect could be due to aging of the sensor, changes in how a person uses the biometric system, or other factors. The essential question for iris biometrics is - does the quality of a match between two images of the same iris change with increased time between the enrollment image and the image to be recognized? That is, does a template aging effect exist? We present results of the first systematic investigation of this question.

We use an image dataset involving 23 persons (46 irises) with approximately four years of time lapse between the earliest and latest images of a given iris. We consider image pairs in a short-time-lapse group, representing no more than 120 days of time lapse between the two images, and in a long-time-lapse group, representing at least 1,200 days of time lapse. We experiment with three iris biometric systems: our modification of the IrisBEE baseline matcher [26], Neurotechnology's VeriEye system [32], and the Cam-2 submission to the Iris Challenge Evaluation 2006 [25]. We find that, for each of the three systems, there is no significant difference in the non-match, or "impostor", distributions between the short-time-lapse and the long-time-lapse data. We also find that, for each of the three systems, the match distribution for the long-time-lapse data is different from that for the short-time-lapse data in a way that results in an increased false reject rate. Thus, we observe clear evidence of a template aging effect for iris biometrics.

## 2 Previous and Related Work

We do not know of any experimental study that supports the conclusion that template aging does not occur for iris biometrics. Claims about the stability of iris texture appear to be based on subjective human visual perception of iris texture in

visible-light images of the iris. However, it has been shown that humans are able to perceive similarities in iris texture that do not result in closer iris biometric matches [15]. Thus human perception of the general iris texture pattern does not automatically or necessarily imply anything about iris biometric operation.

Gonzalez et al. [29] report an effect of time lapse on iris recognition that may initially seem similar to our results. However, Gonzalez et al. compare matches between images acquired at the same acquisition session with those acquired with at most three months time lapse. They report a better match statistic for images from the same session than for those across sessions. However, they show little change in match statistics when comparing matches with short time lapses, between two weeks and three months. In our results presented here, we do not consider matches between images acquired in the same acquisition session, as we expect that this is not representative of a real-world biometric scenario. We expect that "same session" images will generally result in atypically good matches. Like Gonzalez et al., we do not find any significant difference in match scores for images with a few months time lapse. However, when considering a longer time lapse than that examined in Gonzalez et al., we do observe a statistically significant degradation in match scores.

This paper expands upon our initial results [4] in several ways. First, we have increased the number of subjects from 13 to 23 and the number of irises from 26 to 46. Second, in [4] we only considered images from spring 2004 and spring 2008 and the matches within one semester and matches across the four years. In this work we now consider all images acquired from 2004 through 2008 and have set two time thresholds in defining our short-time-lapse and long-time-lapse matches. Third, we have tested the time-lapse effect on two additional iris biometric algorithms: Neurotechnology's VeriEye [32] and the Cam-2 submission to the Iris Challenge Evaluation 2006 from the University of Cambridge [25]. We also test for various possible causes of match score degradation with increased time lapse. Finally, we present ROC curves for short-time-lapse and long-time-lapse matches for each of the three algorithms, and explicitly show the difference in the false reject rates.

### 3 Image Dataset and Algorithms

All of the iris images used in this study were acquired with the same LG 2200 iris imaging system [16], located in the same studio throughout the four years of image acquisition. The system had no hardware or software modifications during the four years. The LG 2200 model is now discontinued. However, current state-of-the-art iris imaging systems of course did not exist at the time that data acquisition for this experiment started. We are currently pursuing additional work with images acquired using a newer model sensor and initial results [9] are generally consistent with results of this study.

Image acquisition sessions were held at multiple times in each academic semester across the four years. At a given acquisition session, for a given subject, six images were acquired of each eye. The image acquisition protocol was the same as that

used in the Iris Challenge Evaluation (ICE) 2005 and 2006 [25][26]. However, it is important to note that while the protocol for the ICE acquisitions allowed for some images that did not pass the normal built-in quality control checks of the LG 2200 [25], *all images used in this study were manually screened for image quality*. Images of noticeably poor quality were excluded from this study; e.g., out-of-focus irises, major portions of the iris occluded, obvious interlace artifacts, etc., were all excluded. Also, images that resulted in a noticeably poor iris segmentation by the IrisBEE algorithm were excluded from the study. (The detailed segmentation was not available from the other systems.)

A total of 23 persons participated in data acquisitions from 2004 through 2008. See Figure 1 for examples of iris images. There are images from both irises of the 23 subjects over the four years. Subject age ranges from 22 to 56 years old at the end of the four-year period. Sixteen subjects are male and seven are female. Sixteen subjects are Caucasian and seven are Asian. The repeated sixteen by seven breakdown is a coincidence; the ethnicity division does not follow the gender division. None of the subjects wore glasses for any of the data acquisition. Five subjects wore contact lenses at all acquisition sessions, and eighteen subjects did not wear contact lenses at any acquisition session. The total number of iris images selected for use in this study was 6,797.

We created two sets of image pairs, a short-time-lapse set and a long-time-lapse set. The short-time-lapse set consists of image pairs where the two images were acquired with no more than 120 days of time lapse between them. The average time lapse in this group is 44 days. The long-time-lapse set consists of image pairs acquired with no less than 1,200 days of time lapse. The average time lapse in this group is 1,405 days. A given iris image can participate in multiple short-time-lapse pairs and multiple long-time-lapse pairs.

#### 4 Iris Matching Algorithms

To investigate the generality of any observed effects, three different iris biometric algorithms were included in the study. First, we used our own modified version of the IrisBEE system distributed through the ICE program [25]. This system represents an iris as a 240x10x2-bit iris code generated from the complex-valued responses of one-dimensional log-Gabor wavelet filters applied to the normalized iris image [20]. For the IrisBEE matcher, the output of matching two iris images is a fractional Hamming distance. The range of the fractional Hamming distance is  $[0, 1]$ , with zero being a perfect match and 0.5 a random level of match. Second, we used the commercial VeriEye 2.2 Iris SDK from NeuroTechnology [32]. This system produces match scores on a different scale and with a different polarity than systems employing fractional Hamming distance. For the analysis in this paper, we negated the match scores so that lower scores represented better matches. The third system was the Cam-2 submission to the ICE 2006 from the University of Cambridge [25]. The output of the Cam-2 matcher is nominally a fractional Hamming distance. Thus we

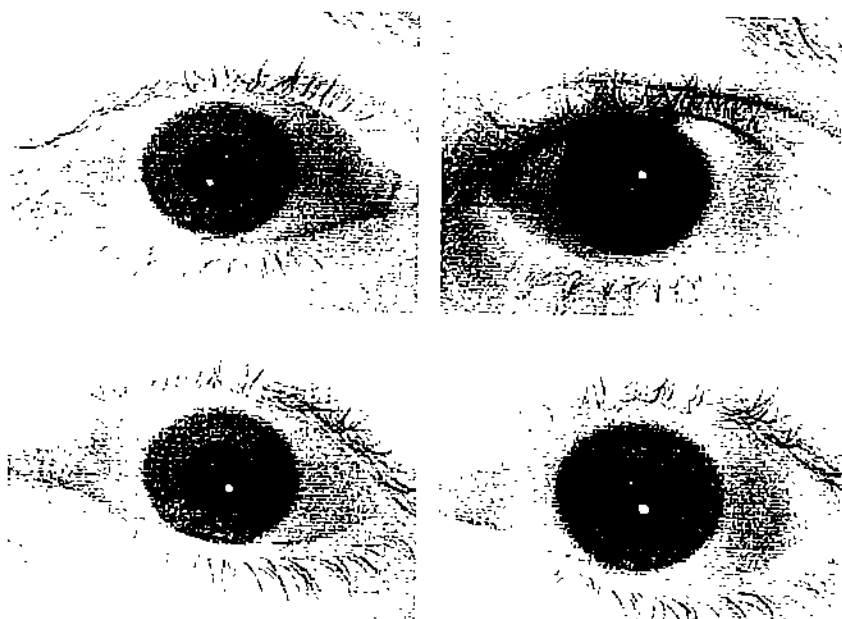


Fig. 1 Example iris images of a subject taken in 2004 and 2008 (subject 04233). Upper left: right iris from 2004; upper right: right iris from 2008; lower left: left iris from 2004; and lower right: left iris from 2008.

have used three different algorithms. One is based on a "baseline" source code that was made available to the research community, one is a readily available commercial product, and one was a best performer in the ICE 2006 results.

## 5 False Reject Rates for Short and Long Time Lapse

We computed the authentic and impostor distributions for each of the three algorithms. The impostor distributions showed no apparent difference between the short-time-lapse data and the long-time-lapse data. However, the authentic distributions for long-time-lapse data were shifted in the direction of the impostor distribution. For each of the three algorithms, the shift in the authentic distribution is such that it causes an increase in the False Reject Rate (FRR) for any practical choice of decision threshold.

Graphs that zoom in on the "tails" of the long-time-lapse and short-time-lapse authentic distributions for each algorithm are shown in Figure 2. These graphs show the tails of the distributions across a range of possible values for the decision threshold. Recall that for the IrisBEE and Cam-2 algorithms, a smaller value (of fractional

Hamming distance) represents a better match, while for the VeriEye algorithm a larger value of different units represents a better match.

This figure shows that for all three algorithms, across a broad range of possible threshold values, *the long-time-lapse authentic distribution has a higher false reject rate than the short-time-lapse authentic distribution*. The IrisBEE algorithm shows approximately 150% increase in the false reject rate across the range of decision thresholds, the VeriEye algorithm shows an approximately 70% increase, and the Cam-2 algorithm shows an approximately 40% increase. Thus we observe clear and consistent evidence of a template aging effect for each of three algorithms considered in this study.

## 6 Frequency of Authentic Distribution With Worse Mean Score

We also performed a one-sided sign test to check for statistical significance of the frequency, across the 46 irises, of the long-time-lapse authentic distribution having a worse mean match score than the short-time-lapse authentic distribution. A worse mean score is one closer to the impostor distribution. If time lapse has no effect, then we would expect that the long-time-lapse mean is worse for half of the irises and the short-time-lapse mean is worse for half. This is the null hypothesis for the test. The sign test does not make any distributional assumptions about the means of similarity scores. The one-sided test was selected because we are interested in the alternative hypothesis that the longer-time-lapse data has a larger mean score.

Table 1 Sign test for frequency of worse mean match score with longer time lapse.

Algorithm	No. irises	test statistic	p-value
IrisBEE	42	5.75	$2.55 \times 10^{-9}$
VeriEye	41	5.46	$2.20 \times 10^{-8}$
Cam-2	38	4.57	$4.62 \times 10^{-6}$

The sign test results are presented in Table 1, including the test statistic, p-value, and number of irises for which the mean of the long-time match scores is worse than the mean of the short-time-lapse match scores ( $\mu_L(i) > \mu_S(i)$ ). The results show that we can easily reject the null hypothesis for all three algorithms. The frequency of a worse match score occurring for the long-time-lapse is statistically significant. This indicates that the increased FRR seen in Figure 2 is not the result of a small number of unusual irises in the data set, but is characteristic of the data set in general.

Table 1 shows that for IrisBEE there are 42 of 46 irises for which the long-time-lapse mean HD is worse, for VeriEye there are 41 irises for which the long-time-lapse mean match score is worse, and for Cam-2 there are 38 irises for which the long-time-lapse mean HD is worse. One natural question is: how many of these irises are in common? The answers are presented in Table 2, which shows the number of irises in common. The last row reports that 34 irises have the time-lapse

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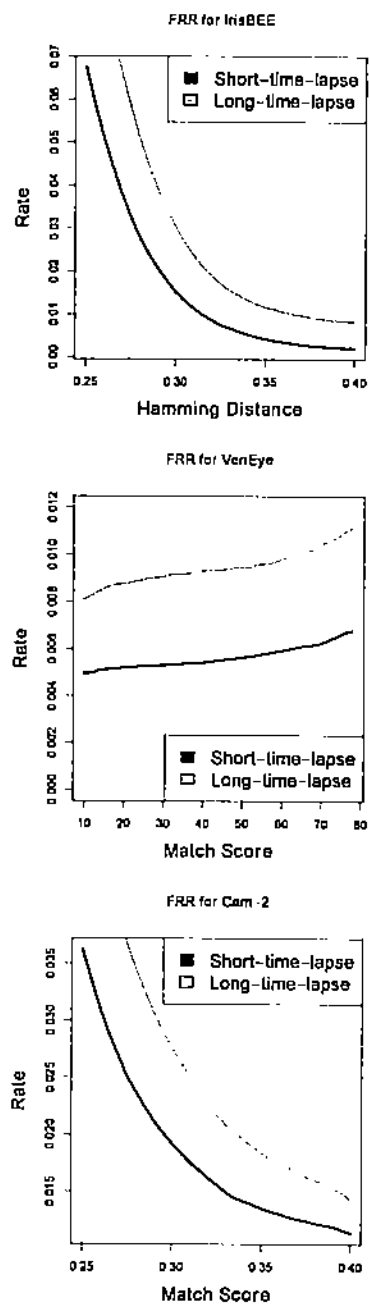


Fig. 2 Authentic distributions across a range of match scores, showing increased false reject rates.



**Table 2** Overlap in number of irises for which the mean of the long-time match scores is greater than the mean for the short-time match scores. The overlap is reported for all combinations of the three algorithms and for all three algorithms.

Algorithms	N of 46 irises in common
IrisBEE-veriEye	38
IrisBEE-Cam2	35
VeriEye-Cam2	35
All three	34

effect for all three algorithms. A one-sided sign test for 34 of 46 irises showing an effect across all three algorithms produces a test statistic of 3.391 with a p-value of  $8.207 \times 10^{-14}$ . Thus, even if we use the criteria that all three algorithms must agree on the movement of the means, the null hypothesis is rejected.

## 7 Possible Causes of an Increased False Reject Rate

We considered a variety of factors that could conceivably contribute to causing the observed result. For example, it is known that the presence of contact lenses can adversely affect match quality [3]. If the short-time-lapse data contained image pairs where a subject did not wear contact lenses and the long-time-lapse data contained image pairs where the same subject was wore contacts, this could conceivably cause an increased FRR for long-time-lapse relative to short-time-lapse. Similarly, if a person was wearing the same type of contacts in short-time-lapse image pairs, but a different type in long-time-lapse image pairs, this could conceivably cause an increased FRR.

We manually checked for the presence of contact lenses in all images included in this study. We found that each subject in this study either wore contacts for all acquisition sessions, or did not wear contacts to any acquisition session. Also, for the subjects who wore contacts, none appear to have changed the type of contacts worn. Thus we conclude that the wearing of contact lenses is not an appreciable factor in our observed results.

Hollingsworth et al. [13] showed that the degree of the pupil dilation, and the difference in pupil dilation between two images, can affect the match distribution. We performed an analysis of the changes in pupil dilation and its possible effect on the difference between long-time-lapse and short-time-lapse data.

The first step in the analysis was to compute the ratio of the pupil diameter to the iris diameter for each image. The second step was to compute the difference in the pupil-to-iris ratio for the iris images in each match pair. Then, for each subject, we computed the average change in the pupil-to-iris ratio over all short-time-lapse match pairs. We denote this by  $r_S(i)$ . Similarly, we computed the average change in the pupil-to-iris ratio for all long-time match pairs, denoted by  $r_L(i)$ . Then for each iris, we computed the difference between the average short-time-lapse change in the pupil to iris ratio and the average long-time-lapse change in the pupil to iris

ratio, denoted by  $r_L(i) \sqcup r_S(i)$ . For the IrisBEE algorithm, we created a scatter plot of the change in the pupil-to-iris ratio between long-time-lapse and short-time-lapse match pairs and change in match score between long-time-lapse and short-time-lapse. Figure 3 is a scatter plot of  $\mu_L(i) \sqcup \mu_S(i)$  versus  $r_L(i) \sqcup r_S(i)$ . The corresponding Kendall correlation coefficient is 0.217. If the observed increase in false reject rate could be attributed to a change in pupil dilation, then  $\mu_L(i) \sqcup \mu_S(i)$  versus  $r_L(i) \sqcup r_S(i)$  would be substantially correlated. If  $|r_L(i)| > |r_S(i)|$ , then there is a greater difference in diameters of the pupils for long-time match pairs than for short-time match pairs. In turn this implies that match scores should degrade. However, our analysis shows minimal correlation between  $\mu_L(i) \sqcup \mu_S(i)$  versus  $r_L(i) \sqcup r_S(i)$ . Thus we conclude changes in pupil dilation are not an appreciable factor in our observed result.

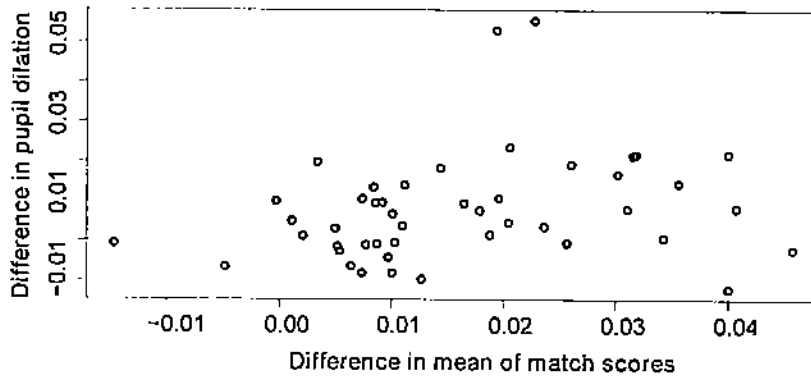


Fig. 3 Scatterplot of the change in match score between long-time and short-time lapse for each iris versus the change in the pupil to iris ratio between long-time and short-time lapse match pairs ( $\mu_L(i) \sqcup \mu_S(i)$  versus  $r_L(i) \sqcup r_S(i)$ ). The horizontal axis is the change in mean match scores for the long-time and short time lapse iris pairs. The vertical axis is the change in the average short-time change in the pupil to iris ratio and the average long-time change in the pupil to iris ratio. Each red circle is an iris.

The percentage of an iris that is occluded can affect iris matching performance [10]. The more of the iris that is observable, the better the expected performance. Thus one possible factor contributing to the observed increase in the false reject rate is that the percentage of the iris that is observable decreased in the long-time-lapse data relative to the short-time-lapse data.

In the IrisBEE algorithm [25], the fraction of the iris that is visible is indicated by the fraction of the iris code bits that are marked in the iris code mask as representing non-occluded portions of the iris. To determine if there is a change over time in the fraction of the iris that is occluded, we divided the time period over which the data

was collected for this study into 30-day intervals. We computed the average number of bits marked as non-occluded in the mask for all images collected in each 30-day interval. We then computed Kendall's correlation coefficient between the average number of bits marked as non-occluded and time. The resulting Kendall's correlation coefficient is -0.131. This indicates that there is no substantial correlation between number of bits marked as non-occluded and elapsed time. Thus, we conclude that change in the amount of iris occluded does not account for the increase in the false reject rate observed in our results.

The iris images in the time-lapse study were collected with the same LG 2200 sensor [16]. It is conceivable that the sensor properties of the LG 2200 could have changed over time in such a way as to cause an increased false reject rate in the long-time-lapse data. To test for this, in the Fall 2008 we collected iris images with a second rarely-used LG 2200 camera. We collected approximately 3000 images from 77 subjects (154 irises) who attended three separate acquisition sessions (labeled "session one," "session two," and "session three"). There was approximately two weeks elapsed time between each session. During sessions one and three, iris images were collected with the original camera; during session two the iris images were collected with the second rarely-used camera. The first step in our sensor aging analysis was to compute the match and non-match score distributions between iris images collected in session one and session three, both sessions using the original sensor. The second step was to compute the match and non-match score distributions between iris images collected in session one and session two. In session two, the images were collected with the second rarely-used sensor. If the sensor age affects match quality, we would expect a significant degradation in match scores between images collected from the two different sensors compared to image pairs collected with the original sensor. The average match score for image pairs collected with the original sensor is 0.215; the average match score for image pairs collected with the two different sensors was 0.217. Figure 4 shows a histogram for the match and non-match distributions for both within and between sensor comparisons. Based on this analysis, we conclude that a sensor aging effect cannot account for the increase in false reject rate that is seen in our results.

The LG 2200 camera actively illuminates the iris using three infrared light emitting diodes (LED) positioned on the left, right, and top of the sensor. When acquiring images, the camera is designed to take three images, one with each LED. In commercial applications, the camera will save the best quality image and discard the other two. For our acquisitions, the system had the capability to save all three images (for a detailed explanation see Phillips et al. [26, 25]). It is conceivable that if there were more matches between images acquired with the same LED in the short-time-lapse group, and more matches between images acquired with different LEDs in the long-time-lapse group, that this could result in an increased false reject rate for the long-time-lapse group.

We grouped the matches into those in which the two images were taken with the same LED and those in which the two images were taken with different LEDs. For both groups, we observed an increased false reject rate of about 50% across all feasible decision threshold values for the long-time-lapse data over the short-time-

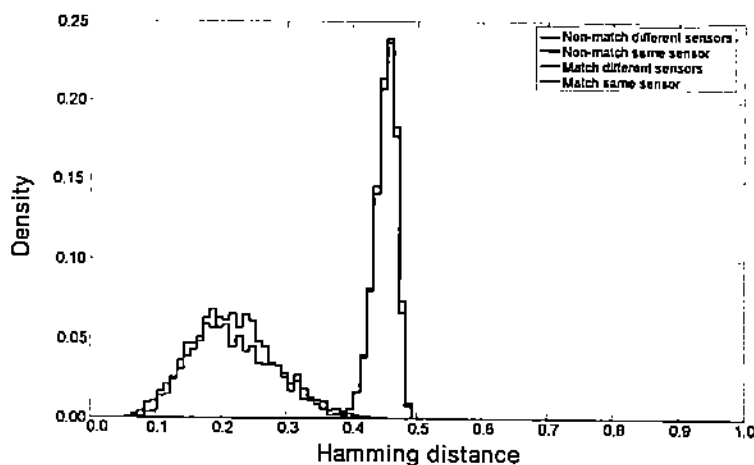


Fig. 4 The match and non-match distributions for the within and between sensors experiments. The match and non-match distributions are for the Hamming distance from the IrisBEE algorithm. The mean Hamming distance for match scores collected with the same sensor is 0.2153 and for match scores collected with difference sensors is 0.2167. The mean Hamming distance for non-match scores collected with the same sensor is 0.4483 and for non-match scores collected with difference sensors is 0.4478.

lapse data. Thus we conclude that variations in the particular LED illuminating the images is not the cause of the increased false reject rate seen in our results.

## 8 Conclusions and Discussion

For three different matching algorithms, and across the range of practical decision threshold values for each matching algorithm, we found that the false reject rate increases with longer time lapse between enrollment and verification. This is seen clearly in the difference in the tails of the authentic distributions. Also, the frequency of irises with a worse mean match score for long-time-lapse compared to short-time-lapse is statistically significant. Thus our experimental results show clear and consistent evidence of a template aging effect for iris biometrics. The magnitude of the template aging effect varies between algorithms, with the value of the decision threshold, and other factors.

We were able to test for a variety of factors that could potentially contribute to observing an increased false reject rate with increased time lapse. We concluded that factors such as varying pupil dilation, wearing of contact lenses, differences in amount of iris occluded, and sensor aging are not an appreciable factor in our experimental results.

It is possible that the template aging effect observed in our experimental results is caused by normal aging of the eye. One well-known example of age-related change in the normal eye involves pupil size. Winn et al. studied factors affecting light-adapted pupil size and found that "of the factors investigated, only chronological age had a significant effect on the size of the pupil" [33]. They concluded "the results of this study are consistent with previous reports suggesting that pupil size becomes smaller in an almost linear manner with increasing age" [33]. The iris, of course, controls the pupil size, and so this change in average pupil size reflects a change in the functioning of the iris tissue. As the Merck Manual of Geriatrics describes it, "The iris comprises two sets of muscles that work together to regulate pupillary size and reaction to light. With aging, these muscles weaken and the pupil becomes smaller (more miotic), reacts more sluggishly to light, and dilates more slowly in the dark" [23].

There are also age-related changes in the melanocytes, the cells that produce melanin, in the iris. Eye color is largely determined by the melanocytes in the anterior layer of the iris. For some segments of the population, aging can lead to a noticeable change in the melanocytes, and so the eye color. Bito et al. report that "Most individuals had stable eye color after early childhood. However, there was a subpopulation of white subjects with eye color changes past childhood. Approximately 17% of twins and 11% of mothers experienced a change in eye color of 2 U or more. [...] Thus, eye color, and hence, iridial pigmentation, seems to change in some individuals during later years" [5]. They found that the changes in eye color were more similar for identical twins than fraternal twins, indicating a genetic link to this particular element of aging. One element of melanocyte aging can, in rare cases, lead to a cancer. "The melanocytes in the iris are constantly exposed to UV radiation, and this leads to the malignant transformation of these cells to form a specific type of malignant tumor, the uveal melanoma" [12].

Also connected with the melanocytes, iris freckles and nevi can arise in the iris, and can grow over time. "Iris freckles are the most common iris tumors found in children as well as adults. They are collections of benign, but abnormal melanocytes that vary in size and shape. Although congenital, they tend to become more prominently pigmented with age. Iris freckles are clusters of normal melanocytes and have no malignant potential. Nevi efface the iris architecture and may cause clinical structural alterations ..." [34].

In addition, it is known that the cornea undergoes age-related changes. "The shape and aberrations of the cornea change with age. It is well known that the radius of curvature slightly decreases with age, and the asphericity also changes. On average, the cornea becomes more spherical with age and, as a consequence, spherical aberrations tend to increase" [1]. The iris is imaged through the cornea, thus, corneal changes may affect iris images.

Small, incremental changes in imaged iris texture over time should be considered normal, as "... age related changes take place in all ocular tissues of the human eye ..." [2]. The relevant question for iris biometrics is the time scale at which normal aging has an appreciable effect on the biometric template computed from the imaged iris texture. To underscore this point, we quote from the Flom and Safir iris recogni-

tion patent [11] - "The basic, significant features of the iris remain extremely stable and do not change over a period of many years. Even features which do develop over time, such as the atrophic areas discussed above, usually develop rather slowly, so that an updated iris image will permit identification for a substantial length of time". In this quote, it is clear that Flom and Safir anticipated the possibility that small, incremental changes in iris texture could potentially result in the need for an "updated image" and re-enrollment of the iris template. One interpretation of our results is that they confirm that the possibility that Flom and Safir envisioned is in fact true.

In an attempt to identify the regions of the iris that changed, degrading the match quality, we visually examined the iris images. Visual examination of the iris image pairs with the poorest match scores for the IrisBEE algorithm revealed no drastic or obvious changes in the irises or their textures. This suggests that, if the template aging effect is due to normal aging of the eye, humans may not be able to easily perceive the subtle changes that are involved.

Much additional research remains to be done in the area of template aging for iris biometrics. While we have experimentally observed a template aging effect, and have ruled out several factors as primary causes of the observed effect, we have not conclusively identified a primary cause of the observed template aging. It is important to understand the cause of the observed template aging effect, so that techniques can be developed to mitigate the effect. It would also be valuable to know whether or not iris biometric template aging is constant across different demographic groups, and whether it occurs at a faster or slower rate as a person ages. Studies that collect new and larger data sets, involve a larger pool of subjects, different sensors, a longer time period, and / or a sample of subjects that represent a greater range of demographics would all be important.

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The opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of our sponsors. The identification of any commercial product or trade name does not imply endorsement or recommendation by the authors, the University of Notre Dame, or the National Institute of Standards and Technology.

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Agenda item 68 (a)

**Promotion and protection of human rights:  
implementation of human right instruments**

### **Promotion and protection of human rights and fundamental freedoms while countering terrorism\***

#### **Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with General Assembly resolution 68/178 and Human Rights Council resolution 15/15.

\* Late submission.

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**Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

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*Summary*

The present report is the fourth annual report submitted to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

The key activities undertaken by the Special Rapporteur between 17 December 2013 and 31 July 2014 are listed in section II of the report. In section III, the Special Rapporteur examines the use of mass digital surveillance for counter-terrorism purposes, and considers the implications of bulk access technology for the right to privacy under article 17 of the International Covenant on Civil and Political Rights.

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## **I. Introduction**

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, pursuant to General Assembly resolution 68/178 and Human Rights Council resolutions 15/15, 19/19, 22/8 and 25/7. It sets out the activities of the Special Rapporteur carried out between 17 December 2013 and 31 July 2014. It then examines the use of mass digital surveillance for counter-terrorism purposes, and considers the implications of bulk access technology for the right to privacy under article 17 of the International Covenant on Civil and Political Rights.

## **II. Activities related to the mandate**

2. On 13 February 2014, the Special Rapporteur participated as a speaker in a panel discussion entitled “Debating *Kadi II*: United Nations Ombudsperson v. judicial review in Security Council sanctions decision-making”, at the London School of Economics, in London.

3. From 23 to 25 February 2014, the Special Rapporteur participated in an expert seminar on the theme “The right to privacy in the digital age”, hosted by the Permanent Missions of Austria, Brazil, Germany, Liechtenstein, Mexico, Norway and Switzerland in Geneva, and facilitated by the Geneva Academy of International Humanitarian Law and Human Rights, in Geneva.

4. On 11 March 2014, the Special Rapporteur presented his report on the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict, and its civilian impact (A/HRC/25/59) to the Human Rights Council at its twenty-fifth session. He also held an interactive dialogue with the Council on his reports on his country visits to Burkina Faso (A/HRC/25/59/Add.1) and Chile (A/HRC/25/59/Add.2).

5. On 12 March 2014, Special Rapporteur participated as a panellist in a side event on the topic “Human rights and drones” and held a press conference at the twenty-fifth session of the Human Rights Council.

## **III. Counter-terrorism and mass digital surveillance**

### **A. Introduction and overview**

6. The exponential growth in States’ technological capabilities over the past decade has improved the capacity of intelligence and law enforcement agencies to carry out targeted surveillance of suspected individuals and organizations. The interception of communications provides a valuable source of information by which States can investigate, forestall and prosecute acts of terrorism and other serious crime. Most States now have the capacity to intercept and monitor calls made on a landline or mobile telephone, enabling an individual’s location to be determined, his or her movements to be tracked through cell site analysis and his or her text messages to be read and recorded. Targeted surveillance also enables intelligence and law enforcement agencies to monitor the online activity of particular

individuals, to penetrate databases and cloud facilities, and to capture the information stored on them. An increasing number of States are making use of malware systems that can be used to infiltrate an individual's computer or smartphone, to override its settings and to monitor its activity. Taken together, these forms of surveillance provide a mosaic of data from multiple sources that can generate valuable intelligence about particular individuals or organizations.

7. The common feature of these surveillance techniques is that they depend upon the existence of prior suspicion of the targeted individual or organization. In such cases, it is the almost invariable practice of States to require some form of prior authorization (whether judicial or executive), and in some States there is an additional tier of ex post facto independent review. In most States, therefore, there is at least one opportunity (and sometimes more than one) for scrutiny of the information alleged to give rise to the suspicion, and for an assessment of the legality and proportionality of surveillance measures by reference to the facts of a particular case. With targeted surveillance, it is possible to make an objective assessment of the necessity and proportionality of the contemplated surveillance, weighing the degree of the proposed intrusion against its anticipated value to a particular investigation.

8. The dynamic pace of technological change has, however, enabled some States to secure bulk access to communications and content data without prior suspicion. Relevant authorities in these States are now able to apply automated "data mining" algorithms to dragnet a potentially limitless universe of communications traffic. By placing taps on fibre-optic cables through which the majority of digital communications travel, relevant States have thus been able to conduct mass surveillance of communications content and metadata, providing intelligence and law enforcement agencies with the opportunity to monitor and record not only their own citizens' communications, but also the communications of individuals located in other States. This capacity is typically reinforced by mandatory data retention laws that require telecommunications and Internet service providers to preserve communications data for inspection and analysis. The use of scanning software, profiling criteria and specified search terms enables the relevant authorities then to filter vast quantities of stored information in order to identify patterns of communication between individuals and organizations. Automated data mining algorithms link common identifying names, locations, numbers and Internet protocol addresses and look for correlations, geographical intersections of location data and patterns in online social and other relationships.<sup>1</sup>

9. States with high levels of Internet penetration can thus gain access to the telephone and e-mail content of an effectively unlimited number of users and maintain an overview of Internet activity associated with particular websites. All of this is possible without any prior suspicion related to a specific individual or organization. The communications of literally every Internet user are potentially open for inspection by intelligence and law enforcement agencies in the States concerned. This amounts to a systematic interference with the right to respect for the privacy of communications, and requires a correspondingly compelling justification.

10. From a law enforcement perspective, the added value of mass surveillance technology derives from the very fact that it permits the surveillance of the

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<sup>1</sup> [http://blog.privacystrategy.eu/public/published/Submission\\_ISC\\_7.2.2014\\_-\\_Caspar\\_Bowden.pdf](http://blog.privacystrategy.eu/public/published/Submission_ISC_7.2.2014_-_Caspar_Bowden.pdf).

communications of individuals and organizations that have not previously come to the attention of the authorities. The public interest benefit in bulk access technology is said to derive precisely from the fact that it does not require prior suspicion. The circularity of this reasoning can be squared only by subjecting the practice of States in this sphere to the analysis mandated by article 17 of the International Covenant on Civil and Political Rights.

11. Article 17 of the Covenant provides that any interference with private communications must be prescribed by law, and must be a necessary and proportionate means of achieving a legitimate public policy objective (see paras. 28-31 below). The prevention of terrorism is plainly a legitimate aim for this purpose (see paras. 33 and 34 below), but the activities of intelligence and law enforcement agencies in this field must still comply with international human rights law.<sup>2</sup> Merely to assert — without particularization — that mass surveillance technology can contribute to the suppression and prosecution of acts of terrorism does not provide an adequate human rights law justification for its use. The fact that something is technically feasible, and that it may sometimes yield useful intelligence, does not by itself mean that it is either reasonable or lawful (in terms of international or domestic law) (see A/HRC/27/37, para. 24).

12. International human rights law requires States to provide an articulable and evidence-based justification for any interference with the right to privacy, whether on an individual or mass scale. It is a central axiom of proportionality that the greater the interference with protected human rights, the more compelling the justification must be if it is to meet the requirements of the Covenant. The hard truth is that the use of mass surveillance technology effectively does away with the right to privacy of communications on the Internet altogether. By permitting bulk access to all digital communications traffic, this technology eradicates the possibility of any individualized proportionality analysis. It permits intrusion on private communications without independent (or any) prior authorization based on suspicion directed at a particular individual or organization. Ex ante scrutiny is therefore possible only at the highest level of generality.

13. Since there is no target-specific justification for measures of mass surveillance, it is incumbent upon relevant States to justify the general practice of seeking bulk access to digital communications. The proportionality analysis thus shifts from the micro level (assessing the justification for invading a particular individual's or organization's privacy) to the macro level (assessing the justification for adopting a system that involves wholesale interference with the individual and collective privacy rights of all Internet users). The sheer scale of the interference with privacy rights calls for a competing public policy justification of analogical magnitude.

14. As an absolute minimum, article 17 requires States using mass surveillance technology to give a meaningful public account of the tangible benefits that accrue from its use. Without such a justification, there is simply no means to measure the compatibility of this emerging State practice with the requirements of the Covenant. An assessment of proportionality in this context involves striking a balance between the societal interest in the protection of online privacy, on the one hand, and the undoubted imperatives of effective counter-terrorism and law enforcement, on the

<sup>2</sup> See the compilation of good practices on legal and institutional frameworks for intelligence services and their oversight, promulgated by the former Special Rapporteur (A/HRC/14/46, paras. 9-50).

other. Determining where that balance is to be struck requires an informed public debate to take place within and between States. The international community needs to squarely confront this revolution in our collective understanding of the relationship between the individual and the State.<sup>3</sup> It is a prerequisite for any assessment of the lawfulness of these measures that the States using the technology be transparent about their methodology and its justification.<sup>4</sup> Otherwise, there is a risk that systematic interference with the security of digital communications will continue to proliferate without any serious consideration being given to the implications of the wholesale abandonment of the right to online privacy. If States deploying this technology retain a monopoly of information about its impact, a form of conceptual censorship will prevail that precludes informed debate.

15. Some argue that users of the Internet have no reasonable expectation of privacy in the first place, and must assume that their communications are available to be monitored by corporate and State entities alike. The classic analogy drawn by those who support this view is between sending an unencrypted email and sending a postcard. Whatever the merits of this comparison, it does not answer the key questions of legality, necessity and proportionality. The very purpose of the Covenant's requirement for explicit and publicly accessible legislation governing State interference with communications is to enable individuals to know the extent of the privacy rights they actually enjoy and to foresee the circumstances in which their communications may be subjected to surveillance (see paras. 35-39 below). Yet the value of this technology as a counter-terrorism and law enforcement tool rests in the fact that users of the Internet assume their communications to be confidential (otherwise there would be no purpose in intruding upon them). This is reflected in the assertions made by members of the intelligence communities of the United States of America and the United Kingdom of Great Britain and Northern Ireland following the disclosure of mass surveillance programmes operated by these two States, in which the disclosures were said to have damaged national security by alerting potential terrorists to the fact that their communications were under surveillance.<sup>5</sup>

16. Any assessment of proportionality must also take full account of the fact that the Internet now represents the ubiquitous means of communication for many millions of people around the world. The revolution in digital technology has brought about a quantum shift in the way we communicate with one another. Digital communications technologies that use the Internet (including handheld devices and smartphones) have become part of everyday life (see A/HRC/27/37, para. 1). Anyone who wishes to participate in the exchange of information and ideas in the modern world of global communications is nowadays obliged to use transnational

<sup>3</sup> As the United States Privacy and Civil Liberties Oversight Board has observed: "[P]ermitting the government to routinely collect the calling records of the entire nation fundamentally shifts the balance of power between the state and its citizens"; "Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court".

<sup>4</sup> In her report on the right to privacy in the digital age (A/HRC/27/37, para. 48), the High Commissioner for Human Rights noted "the disturbing lack of governmental transparency associated with surveillance policies, laws and practices, which hinders any effort to assess their coherence with international human rights law and to ensure accountability".

<sup>5</sup> See <http://abcnews.go.com/31otter/intel-hends-edward-snowden-profound-damage-us-security/story?id=22285388> and [www.itv.com/news/2013-10-09/the-damage-of-edward-snowdens-revelations/](http://www.itv.com/news/2013-10-09/the-damage-of-edward-snowdens-revelations/).

digital communication technology. Internet traffic is frequently routed through servers located in foreign jurisdictions. The suggestion that users have voluntarily forfeited their right to privacy is plainly unwarranted (*ibid.*, para. 18). It is a general principle of international human rights law that individuals can be regarded as having given up a protected human right only through an express and unequivocal waiver, voluntarily given on an informed basis. In the modern digital world, merely using the Internet as a means of private communication cannot conceivably constitute an informed waiver of the right to privacy under article 17 of the Covenant.

17. The Internet is not a purely public space. It is composed of many layers of private as well as social and public realms.<sup>1</sup> Those making informed use of social media platforms in which messages are posted in full public view obviously have no reasonable expectation of privacy. The postcard analogy is entirely apposite for the dissemination of information through the public dimensions of Twitter and Facebook, for example, or postings on public websites. But reading a postcard is not an apposite analogy for intercepting private messages sent by e-mail, whether they are encrypted or unencrypted.

18. Assuming therefore that there remains a legal right to respect for the privacy of digital communications (and this cannot be disputed (see General Assembly resolution 68/167)), the adoption of mass surveillance technology undoubtedly impinges on the very essence of that right (see paras. 51 and 52 below). It is potentially inconsistent with the core principle that States should adopt the least intrusive means available when entrenching on protected human rights (see para. 51 below); it excludes any individualized proportionality assessment (see para. 52 below); and it is hedged around by secrecy claims that make any other form of proportionality analysis extremely difficult (see paras. 51 and 52 below). The States engaging in mass surveillance have so far failed to provide a detailed and evidence-based public justification for its necessity, and almost no States have enacted explicit domestic legislation to authorize its use (see para. 37 below). Viewed from the perspective of article 17 of the Covenant, this comes close to derogating from the right to privacy altogether in relation to digital communications. For all these reasons, mass surveillance of digital content and communications data presents a serious challenge to an established norm of international law. In the view of the Special Rapporteur, the very existence of mass surveillance programmes constitutes a potentially disproportionate interference with the right to privacy.<sup>6</sup> Shortly put, it is incompatible with existing concepts of privacy for States to collect all communications or metadata all the time indiscriminately. The very essence of the right to the privacy of communication is that infringements must be exceptional, and justified on a case-by-case basis (see para. 51 below).

19. There may be a compelling counter-terrorism justification for the radical re-evaluation of Internet privacy rights that these practices necessitate. However, the arguments in favour of a complete abrogation of the right to privacy on the Internet have not been made publicly by the States concerned or subjected to informed scrutiny and debate. The threat of terrorism can provide a justification for mass surveillance only if the States using the technology can demonstrate with particularity the tangible counter-terrorism advantages shown to have accrued from its use. Moreover, measures justified by reference to States' duties to protect against

<sup>6</sup> See also the view of the High Commissioner for Human Rights, A/HRC/27/37, paras. 20 and 25.

the threat of terrorism should never be used as a Trojan horse to usher in wider powers of surveillance for unrelated governmental functions. There is an ever present danger of "purpose creep", by which measures justified on counter-terrorism grounds are made available for use by public authorities for much less weighty public interest purposes (see para. 55 below). In the present report, the Special Rapporteur builds upon the work of his predecessor (A/HRC/13/37) and the former Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (A/HRC/23/40). He argues that there is now an onus on States deploying bulk access surveillance technology to explain promptly, precisely and publicly why this wholesale intrusion into collective privacy is justified for the prevention of terrorism or other serious crime.

**B. Recent disclosures concerning the nature and extent of States' digital surveillance capabilities**

20. On 5 June 2013, a national newspaper in the United Kingdom published the content of a classified court order authorized by the United States Foreign Intelligence Surveillance Court under section 215 of the Patriot Act. The order reportedly required one of the largest telecommunications providers in the United States to hand over to the National Security Agency all "telephony metadata" on a daily basis for a three-month period and prohibited the company from disclosing the existence of the request or the order itself. On 6 June 2013, a United States newspaper published a separate story disclosing the existence of a covert National Security Agency digital programme called PRISM. The programme, reportedly authorized pursuant to section 702 of the United States Foreign Intelligence Surveillance Act, was said to involve the collection of content data from the central servers of nine leading United States technology companies.

21. According to reports in both newspapers, the material retrieved through PRISM was made available to other intelligence agencies, including the Government Communications Headquarters of the United Kingdom. Subsequent disclosures reported the existence of a separate data collection programme called Upstream, which is said to involve the capture of both telephone and Internet communications passing through fibre-optic cables and infrastructure owned by United States service providers. Much of the world's Internet traffic is routed through servers physically located in the United States.

22. The media have subsequently reported that the National Security Agency's Systems Intelligence Directorate includes an applications vulnerabilities branch that collects data from communications systems around the world. The Agency is said to operate an Internet exploitation mechanism called Quantum, which enables it to compromise third-party computers. The methodology reportedly involves taking secret control (or "ownership") over servers in key locations on the "backbone" of the Internet. By impersonating chosen websites (including such common sites as the Google search page), Quantum is able to inject unauthorized remote control software into the computers and Wi-Fi-enabled devices of those who visit the clone site (who will, of course, have no reason to doubt the clone site's authenticity). Technology experts assess that this methodology can permanently compromise the user's computer, ensuring that it continues to provide intelligence to the National Security Agency in the United States indefinitely.



23. The United States Executive and Legislative branches have subsequently taken a number of steps in response to these disclosures. One issue to have emerged from this process is the difference in treatment between United States citizens and non-citizens (even those located within the territorial jurisdiction of the United States). The key developments may be summarized as follows:

(a) On 9 August 2013, President Barack Obama announced that he had requested the Privacy and Civil Liberties Oversight Board<sup>7</sup> to undertake a review of existing counter-terrorism efforts.<sup>8</sup> In late August 2013, the Board called upon the Director of National Intelligence and the Attorney-General to update the intelligence community's procedures on collecting, retaining and disseminating information relating to United States citizens;<sup>9</sup>

(b) On 12 December 2013, the President's Review Group released its report entitled "Liberty and security in a changing world", in which the Group made a number of significant recommendations for reform. In response to that report, on 17 January 2014 President Obama announced a series of proposed legislative and administrative changes.<sup>10</sup> The Administration concurrently released a new Presidential Policy Directive, "PPD-28", to strengthen the oversight of the signals intelligence activities of the intelligence community, both within and outside the United States;<sup>11</sup>

(c) On 23 January 2014, the Privacy and Civil Liberties Oversight Board released the first of two reports in which the majority concluded that the telephone metadata programme was inconsistent with domestic law because section 215 of the Patriot Act did not provide an adequate basis to support it.<sup>12</sup> On 27 March, President Obama announced a set of new proposals to end the existing programme.<sup>13</sup> On 22 May 2014, the House of Representatives adopted the United States Freedom Act, incorporating some of the President's proposals;

(d) On 2 July 2014, the Privacy and Civil Liberties Oversight Board released a second report setting out in detail how surveillance operations under section 702 of the Foreign Intelligence Surveillance Act work in practice.<sup>14</sup> While the report's chief concern was the compatibility of these programmes with United States statutory and constitutional requirements, the Board recognized that they also raised "important but difficult legal and policy questions" concerning the treatment of non-United States persons.<sup>15</sup> The Board took the view that the application of the

<sup>7</sup> The Board is an independent agency within the executive branch with authority to review and analyse counter-terrorism operations and to ensure that they are balanced with the need to protect privacy and civil liberties; see [www.pclob.gov/](http://www.pclob.gov/).

<sup>8</sup> See [www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference](http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference).

<sup>9</sup> See [www.pclob.gov/newsroom](http://www.pclob.gov/newsroom).

<sup>10</sup> See [www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/f33590a-7f8c-11e3-9556-4a4bf7bcbd84\\_story.html](http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/f33590a-7f8c-11e3-9556-4a4bf7bcbd84_story.html).

<sup>11</sup> See [www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence](http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence).

<sup>12</sup> "Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court".

<sup>13</sup> See [www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m](http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m).

<sup>14</sup> "Report on the Surveillance Program Operated Pursuant to Section 702 of the FISA", see [www.pclob.gov/meetings-and-events/2014meetingevents/02-july-2014-public-meeting](http://www.pclob.gov/meetings-and-events/2014meetingevents/02-july-2014-public-meeting).

<sup>15</sup> *Ibid.*, p. 98.

right to privacy to national security surveillance conducted in one country that might affect residents of another country is not "settled" among States parties to the International Covenant on Civil and Political Rights, a proposition that was said to be evidenced by the "ongoing spirited debate".<sup>16</sup>

24. A parallel process of review has taken place within the United Kingdom. On 10 June 2013, in response to allegations that Government Communications Headquarters had circumvented United Kingdom law by using the National Security Agency's PRISM programme to access the content of communications that could not be accessed under domestic law, the Foreign Secretary made a statement in Parliament indicating that any data obtained from the United States involving United Kingdom nationals is "subject to proper United Kingdom statutory controls and safeguards", including the relevant provisions of the Intelligence Services Act of 1994, the Human Rights Act of 1998 and the Regulation of Investigatory Powers Act of 2000.<sup>17</sup>

25. On 21 June 2013, the media reported on the existence of a separate programme operated by Government Communications Headquarters ("Tempora"), under which data interceptors were reportedly placed on fibre-optic cables running between the United Kingdom and the United States to facilitate the interception of both metadata and content information. Whether existing legislation provides Government Communications Headquarters with the lawful authority to conduct such operations, and whether they conform to the right to privacy as guaranteed under article 8 of the European Convention on Human Rights, has been questioned within and outside the United Kingdom Parliament.<sup>18</sup> Subsequent disclosures have focused on the role of the Joint Threat Intelligence Group in Government Communications Headquarters. This agency is reported to have deployed a computer virus called Ambassador's Reception for the purposes of online covert action. This virus is said to be able to encrypt itself and act as a "chameleon" imitating communications by other Internet users.

26. Following a preliminary investigation into Government Communications Headquarters' access to communications and content data, the Intelligence and Security Committee (a Parliamentary committee with responsibility for the oversight of the intelligence community)<sup>19</sup> issued a statement on 17 July 2013. Having taken account of the legal framework governing information-sharing arrangements between Government Communications Headquarters and its overseas counterparts, the Committee concluded that no United Kingdom law had been violated and that Government Communications Headquarters had conformed to its statutory duties under the Intelligence Services Act of 1994. The Committee nevertheless concluded that further investigations were merited to consider whether the existing statutory framework governing access to private communications was adequate given the "complex interaction" among the Intelligence Services Act of 1994, the Human Rights Act of 1998 and the Regulation of Investigatory Powers Act of 2000. On 17 October 2013, the Intelligence and Security Committee

<sup>16</sup> Ibid., p. 100.

<sup>17</sup> See [www.gov.uk/government/speeches/foreign-secretary-statement-to-the-house-of-commons-gchq](http://www.gov.uk/government/speeches/foreign-secretary-statement-to-the-house-of-commons-gchq).

<sup>18</sup> See [www.theguardian.com/uk-news/2013/oct/14/conservative-peer-spying-gchq-surveillance](http://www.theguardian.com/uk-news/2013/oct/14/conservative-peer-spying-gchq-surveillance); and [www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131031/halltext/131031h0001.htm](http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131031/halltext/131031h0001.htm).

<sup>19</sup> See <http://isc.independent.gov.uk/>.

announced that it would broaden the scope of its inquiry following concerns about the extent of intelligence service capabilities and the impact of their operations on the right to privacy.<sup>20</sup>

27. On 8 April 2014, the Court of Justice of the European Union released its judgement in the case of *Digital Rights Ireland*, in which it declared the European Union Data Retention Directive to be incompatible with the right to respect for private life and the right to the protection of personal data, both of which are guaranteed under the Charter of Fundamental Rights of the European Union.<sup>21</sup> The Directive required communication service providers to retain traffic data so as to permit access by the competent national authorities for the purpose of preventing, investigating, detecting and prosecuting serious crime, including terrorism. In holding that the retention of, and access to, traffic data constituted a "particularly serious interference" with both rights, the Court of Justice of the European Union found that the Directive failed to satisfy the principle of proportionality. On 10 July 2014, the United Kingdom Government introduced the Data Retention and Investigatory Powers Bill in response to the ruling. The Government characterized the Bill (now an Act) as a measure to "clarify" the nature and extent of obligations that can be imposed on telecommunications and Internet service providers based in the United Kingdom.<sup>22</sup>

### C. Mass surveillance, counter-terrorism and the right to privacy

#### 1. The right to privacy under article 17 of the International Covenant on Civil and Political Rights

28. Privacy can be defined as the presumption that individuals should have an area of personal autonomous development, interaction and liberty free from State intervention and excessive unsolicited intrusion by other uninvited individuals (see A/HRC/23/40, para. 22; and A/HRC/13/37, para. 11). The duty to respect the privacy and security of communications implies that individuals have the right to share information and ideas with one another without interference by the State (or a private actor), secure in the knowledge that their communications will reach and be read by the intended recipients alone.<sup>23</sup> The right to privacy also encompasses the right of individuals to know who holds information about them and how that information is used.<sup>24</sup>

29. Article 17 of the International Covenant on Civil and Political Rights is the most important legally binding treaty provision guaranteeing the right to privacy at the universal level. It provides that "no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home and correspondence, nor to unlawful attacks on his or her honour and reputation". It further provides that "everyone has the right to the protection of the law against such interference or attacks". Other international human rights instruments contain similar provisions;

<sup>20</sup> See <http://isc.independent.gov.uk/news-archive/17october2013>.

<sup>21</sup> Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, Judgment of 8 April 2014.

<sup>22</sup> See [www.gov.uk/government/speeches/communications-data-and-interception](http://www.gov.uk/government/speeches/communications-data-and-interception).

<sup>23</sup> Human Rights Committee general comment No. 16, para. 8.

<sup>24</sup> *Ibid.*, para. 10; see A/HRC/23/40, para. 22.

and laws at the regional and national levels also reflect the right of all people to respect for their private and family life, home and correspondence.

30. The right to privacy is not, however, an absolute right. Once an individual is under suspicion and subject to formal investigation by intelligence or law enforcement agencies, that individual may be subjected to surveillance for entirely legitimate counter-terrorism and law enforcement purposes (see A/HRC/13/37, para. 13). Although article 17 of the Covenant does not contain a specific limitation clause outlining the circumstances in which interference with the right to privacy may be compatible with the Covenant, it is universally understood as permitting such measures providing that (a) they are authorized by domestic law that is accessible and precise and that conforms to the requirements of the Covenant,<sup>25</sup> (b) they pursue a legitimate aim and (c) they meet the tests of necessity and proportionality.<sup>26</sup>

31. The realization that a large part of the world's Internet traffic is at some point routed through the United States prompted a number of States to express concerns as to whether the right to privacy of their citizens had been violated by the PRISM programme. In December 2013, the General Assembly adopted resolution 68/167, on the right to privacy in the digital age, which was co-sponsored by 57 Member States and adopted without a vote. In that resolution, the Assembly affirmed that the right to privacy must be protected online, and called upon all States to review their procedures, practices and legislation related to communications surveillance, interception and collection of personal data, emphasizing the need for States to ensure the full and effective implementation of their obligations under international human rights law.

32. In the same resolution, the General Assembly also mandated the Office of the United Nations High Commissioner for Human Rights to report to the Human Rights Council and the General Assembly on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance, and/or the interception of digital communications and the collection of personal data, including on a mass scale. In paragraph 47 of her report published on 30 June 2014 (A/HRC/27/37), the High Commissioner concluded that international human rights law provided a clear and universal framework for the promotion and protection of the right to privacy, including in the context of domestic and extraterritorial surveillance, the interception of digital communications and the collection of personal data. She noted, however, that the practice of many States revealed a lack of adequate national legislation and/or enforcement, weak procedural safeguards and ineffective oversight, all of which had contributed to a lack of accountability for arbitrary or unlawful interference with the right to privacy. The High Commissioner emphasized that information was still emerging on the nature and extent of digital surveillance operations but expressed her concern at the "disturbing lack of governmental transparency associated with surveillance policies, laws and practices,

<sup>25</sup> Human Rights Committee general comment No. 16, para. 3.

<sup>26</sup> See A/HRC/27/37, paras. 22-25, and the sources there cited; A/HRC/23/40, paras. 28 and 29; A/HRC/13/37, paras. 13-17; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, annex; Human Rights Committee general comments Nos. 16, 27, 29, 34 and 31; Human Rights Committee, *Van Hult v. Netherlands*, Communication No. 903/2999, 2004; *Madafferi v. Australia*, Communication No. 1011/2001, 2004; *Toonen v. Australia*, Communication No. 488/1992, para. 8.3; *MG v. Germany*, Communication No. 1482/2006, 2008; and CCPR/C/USA/CO/4.

which hinders any effort to assess their coherence with international human rights law and to ensure accountability" (ibid., para. 48). She called upon States to review their national law and practice for conformity with international human rights norms, and to make amendments, where necessary. She also called upon the international community to carry out further in-depth study into the issues (ibid., paras. 49 and 51).

## **2. Counter-terrorism as a legitimate aim**

33. Unlike a number of the qualified rights protected by the Covenant, article 17 does not enumerate an exhaustive list of legitimate public policy objectives that may form the basis of a justification for interfering with the right to privacy. Nonetheless, the prevention, suppression and investigation of acts of terrorism clearly amount to a legitimate aim for the purposes of article 17. Terrorism can destabilize communities, threaten social and economic development, fracture the territorial integrity of States, and undermine international peace and security. Under article 6 of the Covenant, States are under a positive obligation to protect citizens and others within their jurisdiction against acts of terrorism. One aspect of this obligation is the duty to establish effective mechanisms for identifying potential terrorist threats before they have materialized. States discharge this duty through the gathering and analysis of relevant information by intelligence and law enforcement agencies (see A/HRC/20/14, para. 21).

34. The enhanced capacity of States to monitor all Internet traffic is said to be of particular significance in the counter-terrorism context because communications via the Internet have played an important part in the financing and perpetration of acts of international terrorism; because the Internet has been used for the purpose of recruitment to terrorist organizations; and because the identification in advance of those involved in the planning or instigation of acts of terrorism may otherwise be hampered by intelligence limitations. Since terrorism is a global activity, the search for those involved must extend beyond national borders. The prevention and suppression of terrorism is thus a public interest imperative of the highest importance and may in principle form the basis of an arguable justification for mass surveillance of the Internet.

## **3. Mass surveillance and the quality of law requirement**

35. Article 17 of the Covenant explicitly provides that everyone has the right to the protection of the law against unlawful or arbitrary interference with their privacy. This imports a "quality of law" requirement that imposes three conditions: (a) the measure must have some basis in domestic law; (b) the domestic law itself must be compatible with the rule of law and the requirements of the Covenant; and (c) the relevant provisions of domestic law must be accessible, clear and precise. An interference that is authorized by domestic law may nonetheless be "unlawful" and/or "arbitrary" for the purposes of article 17 if the relevant domestic legislation does not meet the core requirements of accessibility, specificity and foreseeability,<sup>27</sup> or if domestic law otherwise fails to meet the standards of necessity and proportionality.<sup>28</sup> Accordingly, domestic law must contain provisions that ensure that intrusive surveillance powers are tailored to specific legitimate aims (see

<sup>27</sup> Human Rights Committee general comment No. 16, para. 3.

<sup>28</sup> Ibid., para. 8.

A/HRC/13/37, para. 60; and A/HRC/27/37, para. 28), and afford effective safeguards against abuse.<sup>29</sup> Moreover, the exercise of executive discretion must be circumscribed with reasonable clarity by the applicable law or binding published guidelines.<sup>30</sup>

36. Accessibility requires not only that domestic law be published, but also that it meet a standard of clarity and precision sufficient to enable those affected to regulate their conduct with foresight of the circumstances in which intrusive surveillance may occur. In paragraph 8 of its general comment No. 16 on the right to privacy, the Human Rights Committee stressed that legislation authorizing interference with private communications "must specify in detail the precise circumstances in which such interference may be permitted". Prior to the introduction of mass surveillance programmes outlined in the present report, this stipulation had always been understood as requiring domestic legislation to spell out clearly the conditions under which, and the procedures by which, any interference may be authorized; the categories of person whose communications may be intercepted; the limits on the duration of surveillance; and the procedures for the use and storage of the data collected.<sup>29</sup> The European Court of Human Rights has also stressed the need for clear detailed rules on the subject.<sup>31</sup>

37. Mass surveillance programmes pose a significant challenge to the legality requirements of article 17 of the Covenant. Where bulk access programmes are in operation, there are no limits to the categories of persons who may be subject to surveillance, and no limits on its duration. These conditions cannot therefore be spelled out in legislation. The detailed legal and administrative frameworks for mass surveillance often remain classified, and little is still publicly known about the ways in which captured data are operationalized. Very few States have so far enacted primary legislation explicitly authorizing such programmes. Instead, outdated domestic laws that were designed to deal with more rudimentary forms of surveillance have been applied to new digital technology without modification to reflect the vastly increased capabilities now employed by some States. Indeed, it has been suggested that certain States have "intentionally sought to apply older and weaker safeguard regimes to ever more sensitive information" (see A/HRC/13/37, para. 57).

38. The Special Rapporteur considers that there is an urgent need for States to revise national laws regulating modern forms of surveillance to ensure that these practices are consistent with international human rights law. Domestic laws governing the interception of communications should be updated to reflect modern forms of digital surveillance that are far broader in scope, and involve far deeper penetration into the private sphere, than those envisaged when much of the existing domestic legislation was enacted. The absence of clear and up-to-date legislation creates an environment in which arbitrary interferences with the right to privacy can occur without commensurate safeguards. Explicit and detailed laws are essential for

<sup>29</sup> CCPR/C/USA/CO/4, para. 22; *Malone v. United Kingdom*, Application No. 8691/79, Judgment of 2 August 1984, paras. 67-68; and *Weber and Saravia v. Germany*, Application No. 54934/00, Judgment of 29 June 2006.

<sup>30</sup> A/HRC/27/37, para. 29; and Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (see E/CN.4/1985/4, annex), paras. 16 and 18.

<sup>31</sup> *Weber and Saravia v. Germany*, Application No. 54934/00, Judgment 29 June 2006; *Uzun v. Germany* (2012) 54 EHRR 121 para. 35.

ensuring legality and proportionality in this context. They are also an indispensable means of enabling individuals to foresee whether and in what circumstances their communications may be the subject of surveillance.

39. A public legislative process provides an opportunity for Governments to justify mass surveillance measures to the public. Open debate enables the public to appreciate the balance that is being struck between privacy and security (*ibid.*, para. 56). A transparent law-making process should also identify the vulnerabilities inherent in digital communications systems, enabling users to make informed choices. This is not only a core ingredient of the requirement for legal certainty under article 17 of the Covenant; it is also a valuable means of ensuring effective public participation in a debate on a matter of national and international public interest (see A/HRC/27/37, para. 29; and A/HRC/14/46). In the view of the Special Rapporteur, where the privacy rights of the digital community as a whole are subject to systematic interference, nothing short of detailed and explicit authorization in primary legislation suffices to meet the principle of legality.

40. By contrast, the use of delegated legislation (instruments enacted by the executive under delegated powers) has already permitted the adoption of secret legal frameworks for mass surveillance, inhibiting the ability of the legislature, the judiciary and the public to scrutinize the use of these new powers (see A/HRC/13/37, para. 54). Such provisions do not meet the quality of law requirements in article 17 of the Covenant because they are not sufficiently accessible to the public (see CCPR/C/USA/CO/4). While there may be legitimate public interest reasons for maintaining the secrecy of technical and operational specifications, these do not justify withholding from the public generic information about the nature and extent of a State's Internet penetration. Without such information, it is impossible to assess the legality, necessity and proportionality of these measures. States should therefore be transparent about the use and scope of mass communications surveillance (see A/HRC/23/40, para. 91).

#### **4. Extraterritorial mass surveillance programmes**

41. Certain States have the technical capability to conduct mass surveillance of communications between individuals not resident within their jurisdiction, and have thus implemented surveillance arrangements that have extraterritorial effect. Some of these activities are physically conducted on the territory of the State concerned and therefore engage the principles of territorial jurisdiction under the Covenant. This is the case not only where State agents place data interceptors on fibre-optic cables travelling through their jurisdiction, but also where a State exercises regulatory authority over the telecommunications or Internet service providers that physically control the data (A/HRC/27/37, para. 34). In either case, human rights protections must be extended to those whose privacy is being interfered with, whether or not they are physically located in the country in which the service provider is incorporated. The same is true where legislation on mandatory data retention imposes obligations on service providers located within a State's territorial or legal jurisdiction. Even where States penetrate infrastructure located wholly outside their territorial jurisdiction the relevant authorities nevertheless remain bound by the State's obligations under the Covenant (*ibid.*, paras. 32-35 and the sources cited therein).

42. Extraterritorial surveillance operations pose unique challenges for the application of the "quality of law" requirements in article 17 of the Covenant. Domestic legislation governing the interception of external (international) communications often affords less protection than comparable provisions protecting purely domestic communications.<sup>32</sup> Of even greater concern, some States (including the United States) continue to permit asymmetrical protection regimes for nationals and non-nationals. This difference of treatment affects all digital communications since messages are often routed through servers located in other jurisdictions. However, it has particularly significant ramifications for the penetration of cloud-based computing.<sup>33</sup>

43. Either form of differential treatment is incompatible with the principle of non-discrimination in article 26 of the Covenant, a principle that is also inherent in the very notion of proportionality.<sup>34</sup> Moreover, the use of mass surveillance programmes to intercept communications of those located in other jurisdictions raises serious questions about the accessibility and foreseeability of the law governing the interference with privacy rights, and the inability of individuals to know that they might be subject to foreign surveillance or to interception of communications in foreign jurisdictions. The Special Rapporteur considers that States are legally bound to afford the same protection to nationals and non-nationals, and to those within and outside their jurisdiction.

##### 5. International cooperation between intelligence agencies

44. Similar concerns arise in relation to international intelligence-sharing arrangements. The absence of laws to regulate information-sharing agreements between States has left the way open for intelligence agencies to enter into classified bilateral and multilateral arrangements that are beyond the supervision of any independent authority (see A/HRC/13/37). Information concerning an individual's communications may be shared with foreign intelligence agencies without the protection of any publicly accessible legal framework and without adequate (or any) safeguards. Following a wide process of consultation, the High Commissioner for Human Rights recently found credible evidence that some Governments have systematically routed data collection and analytical tasks through jurisdictions with weaker safeguards for privacy (see A/HRC/27/37, para. 30). Such practices make the operation of the surveillance regime unforeseeable for those affected by it and are therefore incompatible with article 17 of the Covenant.

<sup>32</sup> In her report on privacy in the digital age the High Commissioner identified a number of such provisions: in the United States, the Foreign Intelligence Surveillance Act, sect. 1881(a); in the United Kingdom, the Regulation of Investigatory Powers Act of 2000, sect. 8(4); in New Zealand the Government Security Bureau Act of 2003 sect. 15A; in Australia the Intelligence Services Act sect. 9; and in Canada the National Defence Act, sect. 273.64(1) (see A/HRC/27/37, para. 35, note 30).

<sup>33</sup> European Parliament Directorate General for Internal Policies and Casper Bowden, "The US surveillance programmes and their impact on EU citizens' fundamental rights", 2013.

<sup>34</sup> The Human Rights Committee has also emphasized the importance of "measures to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of individuals whose communications are under direct surveillance", CCPR/C/USA/CO/4, para. 22 (a).



## 6. Safeguards and supervision

45. One of the core protections afforded by article 17 is that covert surveillance systems must be attended by adequate procedural safeguards to protect against abuse.<sup>29</sup> These safeguards may take a variety of forms, but generally include independent prior authorization and/or subsequent independent review. Best practice requires the involvement of the executive, the legislature and the judiciary, as well as independent civilian oversight (see A/HRC/27/37). The absence of adequate safeguards can lead to a lack of accountability for arbitrary or unlawful intrusions on the right to Internet privacy (*ibid.*).

46. Where targeted surveillance programmes are in operation, many States make provision for prior judicial authorization. Judicial involvement that meets international standards is an important safeguard, although there is evidence that in some jurisdictions the degree and effectiveness of such scrutiny has been circumscribed by judicial deference to the executive (*ibid.*, para. 38). In other States, such as the United Kingdom, warrants of interception directed at particular targets are granted by government ministers without prior judicial authority. This is said to be justified on the basis that ministers are democratically accountable to the electorate. The Executive's use of these powers is then subject to review by an independent Interception of Communications Commissioner, and individuals can also bring complaints to a judicial body, the Investigatory Powers Tribunal, which has authority to consider classified information in closed proceedings.

47. In the context of targeted surveillance, whichever method of prior authorization is adopted (judicial or executive), there is at least an opportunity for *ex ante* review of the necessity and proportionality of a measure of intrusive surveillance by reference to the particular circumstances of the case and the individual or organization whose communications are to be intercepted. Neither of these opportunities exists in the context of mass surveillance schemes since they do not depend on individual suspicion. *Ex ante* review is thus limited to authorizing the continuation of the scheme as a whole, rather than its application to a particular individual. The Special Rapporteur considers that those States using mass surveillance technology must establish strong independent oversight bodies that are adequately resourced and mandated to conduct *ex ante* review of the use of intrusive surveillance techniques against the requirements of legality, necessity and proportionality in article 17 of the Covenant (A/HRC/13/37, para. 62).

48. The other procedural dimension of article 17 is the requirement for *ex post facto* review of intrusive surveillance measures. Some States provide for an independent reviewer to monitor the operation of surveillance legislation by analysing the manner and extent of its use and the justification therefor. Such reviews should always incorporate an analysis of the compatibility of State practice with the requirements of the Covenant.

49. In addition to this type of general overview, States are under a specific obligation to provide a remedy to individuals whose Covenant rights have arguably been violated. Article 2, paragraph 3(b), of the Covenant requires States parties to ensure that any person claiming a remedy has an enforceable right to have his or her claim determined by a competent domestic judicial, administrative or legislative authority. In order to render this right effective, domestic law must provide an independent mechanism capable of conducting a thorough and impartial review, with access to all relevant material and attended by adequate due process

guarantees, which has power to grant a binding remedy (including, where appropriate, an order for the cessation of surveillance or the destruction of the product) (see A/HRC/14/46; and A/HRC/27/37, para. 39).

50. In order to invoke the right to an effective remedy, it is generally necessary for an individual to establish that he or she has been the victim of a violation. In the context of secret surveillance measures, this requirement can be difficult or impossible to meet. Very few States have provisions in place requiring ex post notification of surveillance to the suspect. The European Court of Human Rights has, accordingly, relaxed the requirement for individuals to prove that they have been the subject of secret surveillance. It has drawn a distinction between complaints directed towards the existence of a regime that is alleged to fall short of the requirements of the European Convention on Human Rights, and complaints concerning specific instances of unlawful activity by the State. In the former situation, the Court has been prepared to examine the impugned provisions on their face,<sup>35</sup> whereas in the latter situation, it has generally required applicants to show a "reasonable likelihood" that they have been the subject of unlawful surveillance.<sup>36</sup> In the context of mass surveillance regimes, the Special Rapporteur considers that any Internet user should have standing to challenge the legality, necessity and proportionality of the measures at issue.

#### 7. The necessity and proportionality of mass surveillance programmes

51. It is incumbent upon States to demonstrate that any interference with the right to privacy under article 17 of the Covenant is a necessary means to achieving a legitimate aim. This requires that there must be a rational connection between the means employed and the aim sought to be achieved. It also requires that the measure chosen be "the least intrusive instrument among those which might achieve the desired result" (see CCPR/C/21/Rev.1/Add.9; and A/HRC/13/37, para. 60). The related principle of proportionality involves balancing the extent of the intrusion into Internet privacy rights against the specific benefit accruing to investigations undertaken by a public authority in the public interest. However, there are limits to the extent of permissible interference with a Covenant right. As the Human Rights Committee has emphasized, "in no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right".<sup>37</sup> In the context of covert surveillance, the Committee has therefore stressed that any decision to allow interference with communications must be taken by the authority designated by law "on a case-by-case basis".<sup>38</sup> The proportionality of any interference with the right to privacy should therefore be judged on the particular circumstances of the individual case.<sup>39</sup>

52. None of these principles sits comfortably with the use of mass surveillance technology by States. The technical ability to run vast data collection and analysis programmes undoubtedly offers an additional means by which to pursue counter-terrorism and law enforcement investigations. But an assessment of the

<sup>35</sup> *Klass v. Germany* (1979-80) 2 EHRR 214.

<sup>36</sup> *Halford v. United Kingdom* (1997) 24 EHRR 523.

<sup>37</sup> Human Rights Committee general comments Nos. 27 and 31.

<sup>38</sup> Human Rights Committee general comment No. 16, para. 8.

<sup>39</sup> Human Rights Committee general comment No. 16, para. 4, *Van Hulst v. The Netherlands*, Communication No. 903/1999, 2004, para. 7.3; *Toonen v. Australia*, Communication No. 488/1992, para. 8.3.

proportionality of these programmes must also take account of the collateral damage to collective privacy rights. Mass data collection programmes appear to offend against the requirement that intelligence agencies must select the measure that is least intrusive on human rights (unless relevant States are in a position to demonstrate that nothing less than blanket access to all Internet-based communication is sufficient to protect against the threat of terrorism and other serious crime). Since there is no opportunity for an individualized proportionality assessment to be undertaken prior to these measures being employed, such programmes also appear to undermine the very essence of the right to privacy. They exclude altogether the "case-by-case" analysis that the Human Rights Committee has regarded as essential, and they may thus be deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime (see A/HRC/27/37, para. 25). The Special Rapporteur, accordingly, concludes that such programmes can be compatible with article 17 of the Covenant only if relevant States are in a position to justify as proportionate the systematic interference with the Internet privacy rights of a potentially unlimited number of innocent people in any part of the world.<sup>40</sup>

**8. Mandatory retention legislation and the automated mining of communications data held by telecommunications and Internet service providers**

53. Mass surveillance programmes are not confined to the interception of communications content. Digital communications generate large amounts of transactional data. These communications data (or metadata) include personal information on individuals, their location and online activities. Many States have adopted legislation compelling telecommunications and Internet service providers to collect and preserve communications data in order to make them available for subsequent analysis. Such laws typically require service providers to furnish State authorities with Internet protocol allocations, enabling the user of a particular Internet protocol address at any given time to be identified. The capture of communications data has become an increasingly valuable surveillance technique for States. Communications data are easily stored and searched, and can be used to compile profiles of individuals that are just as privacy-sensitive as the content of communications (see A/HRC/27/37, para. 19). By combining and aggregating information derived from communications data, it is possible to identify an individual's location, associations and activities (see A/HRC/23/40, para. 15). In the absence of special safeguards, there is virtually no secret dimension of a person's private life that would withstand close metadata analysis.<sup>41</sup> Automated data-mining thus has a particularly corrosive effect on privacy.

54. In many States, a wide range of public bodies have access to communications data, for a wide variety of purposes, often without judicial authorization or meaningful independent oversight. In the United Kingdom, for example, more than 200 agencies are authorized to seek communications data under the Regulation of Investigatory Powers Act of 2000,<sup>41</sup> and there were 514,608 requests by public

<sup>40</sup> See A/HRC/27/37, para. 25, where the High Commissioner for Human Rights observed: "[I]t will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened; namely whether the measure is necessary and proportionate."

<sup>41</sup> The list of agencies authorized to seek communications data includes tax authorities and local government agencies, and may be extended by delegated legislation (executive order).

authorities for communications data in 2013 alone.<sup>42</sup> Courts have for some time recognized that the release of metadata to a public authority constitutes an interference with the right to privacy, and the Court of Justice of the European Union recently held that the retention of metadata relating to a person's private life and communications is, in itself, an interference with the right,<sup>43</sup> (with the grant of access to retained metadata for the purpose of analysis constituting a further and distinct interference).<sup>44</sup> In reaching this conclusion, the Court of Justice of the European Union emphasized that communications metadata may allow "very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained".<sup>45</sup>

55. Applying the approach adopted by the Court of Justice of the European Union, it follows that the collection and retention of communications data constitute an interference with the right to privacy, whether or not the data are subsequently accessed or analysed by a public authority. Neither the capture of communications data under mandatory data retention legislation, nor its subsequent disclosure to (and analysis by) State authorities, requires a prior suspicion directed at any particular individual or organization. The Special Rapporteur therefore shares the reservations expressed by the High Commissioner as to the necessity and proportionality of mandatory data retention laws (see A/HRC/27/37, para. 26).

## 9. Purpose specification

56. Many States lack "purpose specification" provisions restricting information gathered for one purpose from being used for other unrelated governmental objectives. As a result, data that were ostensibly collected for national security purposes may be shared between intelligence agencies, law enforcement agencies and other State entities, including tax authorities, local councils and licensing bodies.<sup>46</sup> National security and law enforcement agencies are typically excluded from provisions of data protection legislation that limit the sharing of personal data. As a result, it may be difficult for individuals to foresee when and by which State agency they might be subjected to surveillance. This "purpose creep" risks violating article 17 of the Covenant, not only because relevant laws lack foreseeability, but also because surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another (*ibid.*, para. 27). The Special Rapporteur therefore endorses the recommendation of his predecessor that States must be obliged to provide a legal basis for the reuse of personal information, in accordance with human rights principles (see A/HRC/13/37, paras. 50 and 66). This is particularly important where information is shared across borders or between States.

<sup>42</sup> See [www.intelligencecommissioners.com/](http://www.intelligencecommissioners.com/).

<sup>43</sup> Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, Judgment of 8 April 2014, para. 34.

<sup>44</sup> *Ibid.*, para. 35.

<sup>45</sup> *Ibid.*, paras. 26, 27 and 37.

<sup>46</sup> For an analysis of the ways in which such purpose creep has occurred in the United Kingdom, see [www.whatdotheyknow.com/request/127491/response/315758/attach/html/2/Summary%20of%20Counsellors%20advice.pdf.html](http://www.whatdotheyknow.com/request/127491/response/315758/attach/html/2/Summary%20of%20Counsellors%20advice.pdf.html).

#### 10. The private sector

57. States increasingly rely on the private sector to facilitate digital surveillance. This is not confined to the enactment of mandatory data retention legislation. Corporates have also been directly complicit in operationalizing bulk access technology through the design of communications infrastructure that facilitates mass surveillance. Telecommunications and Internet service providers have been required to incorporate vulnerabilities into their technologies to ensure that they are wiretap-ready. The High Commissioner for Human Rights has characterized these practices as “a delegation of law enforcement and quasi-judicial responsibilities to Internet intermediaries under the guise of self-regulation and cooperation” (see A/HRC/27/37, para. 42). The Special Rapporteur concurs with this assessment. In order to ensure that they do not become complicit in human rights violations, service providers should ensure that their operations comply with the Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011 (*ibid.*, paras. 43-46).

### IV. Conclusions and recommendations

58. States' obligations under article 17 of the International Covenant on Civil and Political Rights include the obligation to respect the privacy and security of digital communications. This implies in principle that individuals have the right to share information and ideas with one another without interference by the State, secure in the knowledge that their communication will reach and be read by the intended recipients alone. Measures that interfere with this right must be authorized by domestic law that is accessible and precise and that conforms with the requirements of the Covenant. They must also pursue a legitimate aim and meet the tests of necessity and proportionality.

59. The prevention and suppression of terrorism is a public interest imperative of the highest importance and may in principle form the basis of an arguable justification for mass surveillance of the Internet. However, the technical reach of the programmes currently in operation is so wide that they could be compatible with article 17 of the Covenant only if relevant States are in a position to justify as proportionate the systematic interference with the Internet privacy rights of a potentially unlimited number of innocent people located in any part of the world. Bulk access technology is indiscriminately corrosive of online privacy and impinges on the very essence of the right guaranteed by article 17. In the absence of a formal derogation from States' obligations under the Covenant, these programmes pose a direct and ongoing challenge to an established norm of international law.

60. The Special Rapporteur concurs with the High Commissioner for Human Rights that there is an urgent need for States using this technology to revise and update national legislation to ensure consistency with international human rights law. Not only is this a requirement of article 17, but it also provides an important opportunity for informed debate that can raise public awareness and enable individuals to make informed choices. Where the privacy rights of the entire digital community are at stake, nothing short of detailed and explicit primary legislation should suffice. Appropriate restrictions should be imposed

on the use that can be made of captured data, requiring relevant public authorities to provide a legal basis for the reuse of personal information.

61. States should establish strong and independent oversight bodies that are adequately resourced and mandated to conduct ex ante review, considering applications for authorization not only against the requirements of domestic law, but also against the necessity and proportionality requirements of the Covenant. In addition, individuals should have the right to seek an effective remedy for any alleged violation of their online privacy rights. This requires a means by which affected individuals can submit a complaint to an independent mechanism that is capable of conducting a thorough and impartial review, with access to all relevant material and attended by adequate due process guarantees. Accountability mechanisms can take a variety of forms, but must have the power to order a binding remedy. States should not impose standing requirements that undermine the right to an effective remedy.

62. The Special Rapporteur concurs with the High Commissioner for Human Rights that where States penetrate infrastructure located outside their territorial jurisdiction, they remain bound by their obligations under the Covenant. Moreover, article 26 of the Covenant prohibits discrimination on grounds of, inter alia, nationality and citizenship. The Special Rapporteur thus considers that States are legally obliged to afford the same privacy protection for nationals and non-nationals and for those within and outside their jurisdiction. Asymmetrical privacy protection regimes are a clear violation of the requirements of the Covenant.

63. The Special Rapporteur calls upon all States that currently operate mass digital surveillance technology to provide a detailed and evidence-based public justification for the systematic interference with the privacy rights of the online community by reference to the requirements of article 17 of the Covenant. States should be transparent about the nature and extent of their Internet penetration, its methodology and its justification, and should provide a detailed public account of the tangible benefits that accrue from its use.

64. The Special Rapporteur concurs with his predecessor (see A/HRC/13/37, para. 19) and with the former Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (see A/HRC/23/40, para. 98) that the Human Rights Committee should develop and adopt a new general comment on the right to online privacy, which would reflect developments in the surveillance of digital communications that have taken place since general comment 16 was adopted in 1988.



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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programmes and the  
impact on EU citizens  
fundamental rights





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT C:  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

# The US surveillance programmes and their impact on EU citizens' fundamental rights

## NOTE

### Abstract

In light of the recent PRISM-related revelations, this briefing note analyzes the impact of US surveillance programmes on European citizens' rights. The note explores the scope of surveillance that can be carried out under the US FISA Amendments Act 2008, and related practices of the US authorities which have very strong implications for EU data sovereignty and the protection of European citizens' rights.



This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs

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## LIST OF ABBREVIATIONS

ACLU	American Civil Liberties Union
AUMF	Authorization to Use Military Force
CIA	Central Intelligence Agency
CNIL	Comité National pour l'Informatique et les Libertés
DPAs	Data Protection Authorities
EDPS	European Data Protection Supervisor
ENISA	European Network and Information Security Agency
FAA	Foreign Intelligence Surveillance Amendments Act (2008)
FBI	Federal Bureau of Investigation
FIVE EYES	UK, US, Canada, Australia, New Zealand: sharing intelligence under UKUSA
FISA	Foreign Intelligence Surveillance Act (1978)
FISC	Foreign Intelligence Surveillance Court
FISCR	Foreign Intelligence Surveillance Court of Review
NSA	National Security Agency
PAA	Protect America Act (2007)
SHA	EU-US Safe Harbour Agreement (2000)
TIA	Total Information Awareness
WP29	Article 29 Data Protection Working Party

## EXECUTIVE SUMMARY

This Briefing note provides the LIBE Committee with background and contextual information on PRISM/FISA/NSA activities and US surveillance programmes, and their specific impact on EU citizens' fundamental rights, including privacy and data protection.

Prior to the PRISM scandal, European media underestimated this aspect, apparently oblivious to the fact that the surveillance activity was primarily directed at the rest-of-the-world, and was not targeted at US citizens. The note argues that the scope of surveillance under the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FAA) has very strong implications on EU data sovereignty and the protection of its citizens' rights.

The first section provides a historical account of US surveillance programmes, showing that the US authorities have continuously disregarded the human right to privacy of non-Americans. The analysis of various surveillance programmes (Echelon, PRISM) and US national security legislation (FISA, PATRIOT and FAA) clearly indicates that surveillance activities by the US authorities are conducted without taking into account the rights of non-US citizens and residents. In particular, the scope of FAA creates a power of mass-surveillance specifically targeted at the data of non-US persons located outside the US, including data processed by 'Cloud computing', which eludes EU Data Protection regulation.

The second section gives an overview of the main legal gaps, loopholes and controversies of these programmes and their differing consequences for the rights of American and EU citizens. The section unravels the legal provisions governing US surveillance programmes and further uncertainties in their application, such as:

- serious limitations to the Fourth Amendment for US citizens
- specific powers over communications and personal data of "non-US persons"
- absence of any cognizable privacy rights for "non-US persons" under FISA

The section also shows that the accelerating and already widespread use of Cloud computing further undermines data protection for EU citizens, and that a review of some of the existing and proposed mechanisms that have been put in place to protect EU citizens' rights after data export, actually function as loopholes.

Finally, some strategic options for the European Parliament are developed, and related recommendations are suggested in order to improve future EU regulation and to provide effective safeguards for protection for EU citizens' rights.

## INTRODUCTION

### Background

This Briefing note aims at providing the LIBE Committee with background and contextual information on PRISM/FISA/NSA activities and US surveillance programmes and their impact on EU citizens' fundamental rights, including privacy and data protection.

On June 5<sup>th</sup> the Washington Post and The Guardian published a secret order made under s.215 of the PATRIOT Act requiring the Verizon telephone company to give the NSA details of all US domestic and international phone calls, and "on an ongoing basis". On June 6<sup>th</sup> the two newspapers revealed the existence of an NSA programme codenamed PRISM that accessed data from leading brands of US Internet companies. By the end of the day a statement from Adm. Clapper (Director of NSA) officially acknowledged the PRISM programme and that it relied on powers under the FISA Amendments Act (FAA) 2008 s.702 (aka §1881a). On June 9<sup>th</sup> Edward Snowden voluntarily disclosed his identity and a film interview with him was released.

In the European Parliament resolution of 4 July 2013 on the US National Security Agency surveillance programme, MEPs expressed serious concern over PRISM and other surveillance programmes and strongly condemned spying on EU official representatives and called on the US authorities to provide them with full information on these allegations without further delay. Inquiries by the Commission<sup>1</sup>, Art.29 Working Party<sup>2</sup>, and a few MS Parliaments are also in progress.

### The problem of transnational mass surveillance and democracy<sup>3</sup>

Snowden's revelations about PRISM show that Cyber mass-surveillance at the transnational level induces systemic breaches of fundamental rights. These breaches lead us to question the scale of transnational mass surveillance and its implications for our democracies.

"Our government in its very nature, and our open society in all its instinct, under the Constitution and the Bill of Rights automatically outlaws intelligence organizations of the kind that have developed in police states" (Allen Dulles, 1963)<sup>4</sup>

"There's been spying for years, there's been surveillance for years, and so forth, I'm not going to pass judgement on that, it's the nature of our society"

(Eric Schmidt, Executive chairman of Google, 2013)

These two quotations are distinct in time by 50 years. They differ in the answers but address the same central question: how far can democratic societies continue to exist in their very nature, if intelligence activities include massive surveillance of populations? For Eric Schmidt and according to most of the media reports in the world, the nature of society

<sup>1</sup> European Commissioner - Reding, Viviane (2013), Letter to the Attorney General, Ref. Ares (2013)1935546 - 10/06/2013, Brussels, 10 June 2013

<sup>2</sup> Article 29 Working Party, Letter from the Chairman to Mrs Reding regarding the PRISM program, 13<sup>th</sup> August 2013

<sup>3</sup> Preface by Prof. Didier Bigo

<sup>4</sup> Dulles, Allen Welsh (1963), *The Craft of Intelligence*, New York: Harper&Row, p.257.

has changed. Technologies of telecommunication, including mobile phones, Internet, satellites and more generally all data which can be digitalised and integrated into platforms, have given the possibilities of gathering unprecedented amount of data, to keep them, to organise them, to search them. If the technologies exist, then they have to be used: "it is not possible to go against the flow". Therefore it is not a surprise to discover that programmes run by intelligence services use these techniques at their maximum possibilities and in secrecy. The assumption is that if everyone else with these technical capabilities uses them, then we should too. If not, it would be naively or even worse: a defeat endangering the national security of a country by letting another country benefit from the possibilities opened by these technologies.

However, should we have to live with this extension of espionage to massive surveillance of populations and accept it as "a fact"? Fortunately, totalitarian regimes have more or less disappeared before the full development of these capacities. Today, in democratic regimes, when these technologies are used, they are limited on purpose and are mainly centred on antiterrorism collaboration, in order to prevent attempts of attacks. According to Intelligence Services worldwide, these technologies are not endangering civil liberties; they are the best way to protect the citizen from global terrorism. Intelligence services screen suspicious behaviours and exchange of information occurs at the international level. Only "real suspects" are, in principle, under surveillance. From this perspective, far from being a "shame", the revelations of programmes like PRISM could be seen as a proof of a good level of collaboration, which has eventually to be enhanced in the future against numerous forms of violence.

In front of this "recital" given by the most important authorities of the different intelligence services and the antiterrorism agencies in the US, in the UK, in France, and at the EU level, it is critical to discuss the supposedly new nature of our societies. The impact of technological transformations in democratic societies, how to use these technologies as resources for both information exchange and competition over information (a key element of a globalised world), what are the rights of the different governments in processing them: these are the core questions.

As stated by Allen Dulles above, justifications given by intelligence services work in favour of a police state and against the very nature of an open society living in democratic regimes. Proponents of an open society insist that, against the previous trend, technologies ought not to drive human actions; they have to be used in reasonable ways and under the Rule of Law. The mass scaling has to be contained. Constitutional provisions have to be applied, and the presumption of innocence is applicable for all human beings (not only citizens). If suspicions exist, they have to be related to certain forms of crime, and not marginal behaviours or life styles. Hence, what is at stake here is not the mechanisms by which antiterrorism laws and activities have to be regulated at the transatlantic level, even if it is a subset of the question. It is not even the question of espionage activities between different governments. It is the question of the nature, the scale, and the depth of surveillance that can be tolerated in and between democracies.

Snowden's revelations highlight numerous breaches of fundamental rights. This affects in priority all the persons whose data have been extracted via surveillance of communications, digital cables or cloud computing technologies, as soon as they are under a category of suspicion, or of some interest for foreign intelligence purposes. However, all these persons are not protected in the same way, especially if they are not US citizens. The EU citizen is therefore particularly fragile in this configuration connecting US intelligence services, private companies that provide services at the global level and the ownership they can exercise over their data. It is clear that if EU citizens do not have the same level of protections as the US citizens, because of the practices of the US intelligence services and the lack of effective protections, they will become the first victims of these systems. Freedom of thought, opinion, expression and of the press are cardinal values that have to be preserved. Any citizen of the EU has the right to have a private life,

i.e. a life which is not fully under the surveillance of any state apparatus. The investigative eyes of any government have to be strongly reminded of distinctions between private and public activities, between what is a crime and what is simply a different life-style. By gathering massive data on life-styles in order to elaborate patterns and profiles concerning political attitudes and economic choices, PRISM seems to have allowed an unprecedented scale and depth in intelligence gathering, which goes beyond counter-terrorism and beyond espionage activities carried out by liberal regimes in the past. This may lead towards an illegal form of Total Information Awareness where data of millions of people are subject to collection and manipulation by the NSA.

This note wants to assess this question of the craft of intelligence and its necessary limits in democracy and between them. As we will see, through the documents delivered by Snowden, the scale of the PRISM programme is global; its depth reaches the digital data of large groups of populations and breaches the fundamental rights of large groups of populations, especially EU citizens. The EU institutions have therefore the right and duty to examine this emergence of cyber mass-surveillance and how it affects the fundamental rights of the EU citizen abroad and at home.

#### Privacy governance: EU/ US competing models

A careful analysis of US privacy laws compared to the EU Data Protection framework shows that the former allows few practical options for the individual to live their lives with self-determination over their personal data. However a core effect of Data Protection law is that if data is copied from one computer to another, then providing the right legal conditions for transfer exist, the individual cannot object on the grounds that their privacy risk increases through every such proliferation of "their" data<sup>5</sup>. This holds true if the data is copied onto a thousand machines in one organization, or spread onward to a thousand organisations, or to a different legal regime in a Third Country. The individual cannot stop this once they lose possession of their data, whereas for example if the data was "intellectual property", then a license to reproduce the data would be necessary by permission. We are all the authors of our lives, and it seems increasingly anomalous that Internet companies lay claim to property rights in the patterns of data minutely recording our thoughts and behaviour, yet ask the people who produce this data to sacrifice their autonomy and take privacy on trust.

The EU Data Protection framework in theory is categorically better than the US for privacy, but in practice it is hard to find any real-world Internet services that implement DP principles by design, conveniently and securely.

Privacy governance around the world has evolved around two competing models. Europe made some rights of individuals inalienable and assigned responsibilities to Data Controller organizations, whereas in the United States companies inserted waivers of rights into Terms and Conditions<sup>6</sup> contracts allowing exploitation of data in exhaustive ways (known as the 'Notice-and-Choice' principle).

The PRISM crisis arose directly from the emerging dominance over the last decade of "free" services operated from remote warehouses full of computer servers, by companies predominantly based in US jurisdiction, that has become known as Cloud computing. To explain this relationship we must explore details of the US framework of national security law.

<sup>5</sup> Hondius, Frits W (1975), *Emerging data protection in Europe*. North-Holland Pub. Co.

<sup>6</sup> cf. the documentary "Terms and Conditions May Apply" (2013, USA) dir. Cullen Holback.

### Scope and structure

It is striking that since the first reports of "warrantless wiretapping" in the last decade, and until quite recently in the PRISM-related revelations, European media have covered US surveillance controversies as if these were purely parochial arguments about US civil liberties, apparently oblivious that the surveillance activity was directed at the rest-of-the-world.

This note aims to document this under-appreciated aspect. It will show that the scope of surveillance conducted under a change in the FISA law in 2008 extended its scope beyond interception of communications to include any data in public cloud computing as well. This has very strong implications for the EU's continued sovereignty over data and the protection of its citizens' rights. The aim is here to provide a guide to how surveillance of Internet communications by the US government developed, and how this affects the human right to privacy, integrating historical, technical, and policy analysis from the perspective of the individual EU citizen<sup>7</sup>. The Note will therefore cover the following:

- (I) An account of US foreign surveillance history and current known state
- (II) An overview of the main legal controversies both in US terms, and the effects and consequences for EU citizens' rights
- (III) Strategic options for the European Parliament and recommendations

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<sup>7</sup> New stories based on Snowden's material were breaking throughout the drafting of this Note and whilst every effort has been made to ensure accuracy, it is possible that further revelations could change the interpretations given.



## 1. HISTORICAL BACKGROUND OF US SURVEILLANCE

### KEY FINDINGS

- A historical account of US various surveillance programmes (precursors to Echelon, PRISM, etc.) and US legislation in the field of surveillance (FISA and FAA) shows that the US has continuously disregarded the fundamental rights of non-US citizens.
- In Particular, the scope of FAA coupled with expressly 'political' definitions of what constitutes 'foreign intelligence information' creates a power of mass-surveillance specifically targeted at the data of non-US persons located outside the US, which eludes effective control by current and proposed EU Data Protection regulation.

A historical account of US surveillance programmes provides the context for their interpretation as the latest phase of a system of US exceptionalism, with origins in World War II. These programmes constitute the greatest contemporary challenge to data protection, because they incorporated arbitrary discriminatory standards of treatment strictly according to nationality and geopolitical alliances, which are secret and incompatible with the rule of law under EU structures.

#### 1.1. World War II and the origins of the UKUSA treaties

In the 1970s there were the first disclosures of the extent of Allied success in WWII cryptanalysis. The world discovered the secret history of Bletchley Park (aka Station X), Churchill's signals intelligence headquarters. The story of post-war secret intelligence partnerships at the international level is intertwined with the personal trajectory of Alan Turing, a great mathematician and co-founder of computer science, who was critical to the effort to design automated machines which could feasibly solve ciphers generated by machine, such as Enigma (used for many Nazi Germany communications).

Alan Turing travelled to the US in 1942 to supervise US Navy mass-production of the decryption machines (called 'bombes') for the Atlantic war, and to review work on a new scrambler telephone at Bell Laboratories to be used for communications between Heads of Government. Unfortunately Turing was not equipped with any letters of authority, so he was detained by US immigration as suspicious until rescued by UK officials in New York. What was initially supposed to be a two-week trip turned into months, as no precedent existed to grant even a foreign ally security clearance to the laboratories he was supposed to visit. There followed several months of fraught UK diplomacy and turf wars between the US Navy and Army, since the latter had no "need-to-know" about Ultra (the name given to intelligence produced from decryption at Bletchley). The UK wanted as few people as possible in on the secret, and the disharmony thus experienced inside the US military security hierarchies became known as "the Turing Affair".

These were the origins of the post-war secret intelligence partnership between the US and UK as "first" parties, Canada/Australia/New Zealand as second parties, and other nations with lesser access as third parties. The treaty is named UKUSA, and we know the details above about its genesis because in 2010 the US National Security Agency declassified the unredacted text of UKUSA treaties<sup>8</sup> up until the 1950s with related correspondence (the

<sup>8</sup> UKUSA Agreement Release 1940-1956 Early Papers Concerning US-UK Agreement – 1940-1944, NSA/CSS

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current text is secret). GCHQ<sup>9</sup> did not declassify much in comparison, although the occasion was billed as joint exercise.

The purpose of the UKUSA treaties was to establish defined areas of technical co-operation and avoid conflicts. However, no general "no spy" clause appears in the versions published up until the 1950s, but expressions of amity comparable to public treaties. It is not known whether any comprehensive secret "no spy" agreement exists today between the UK and US, and neither has ever given legislative or executive comment on the matter.

## 1.2. ECHELON: the UKUSA communications surveillance nexus

From the founding of the US National Security Agency (NSA) in 1952 throughout the Cold War, both the UK and US vastly expanded their signal intelligence capacities, collecting from undersea cables at landing points<sup>10</sup>, satellites intercepting terrestrial microwave relays, and arrays of antennae usually sited in military bases and embassies. The evolution and nature of these capabilities were documented from open source research in two reports<sup>11</sup> to the European institutions culminating in the Parliament's inquiry into ECHELON in 2000. ECHELON was in fact a codeword for one particular surveillance system, but became in common usage a synecdoche for the entire UKUSA communications surveillance nexus. The last meeting the EP inquiry committee was on September 10, 2001. The Committee recommended to the European Parliament that citizens of EU member states use cryptography in their communications to protect their privacy, because economic espionage with ECHELON had obviously been conducted by the US intelligence agencies.

## 1.3. 1975-1978: Watergate and the Church Committee

After the US was convulsed by the Watergate scandal culminating in the resignation of Richard Nixon, Senator Frank Church led a Congressional committee of inquiry into abuses of power by law-enforcement and intelligence agencies which had conducted illegal domestic wire-tapping of political and civic leaders under presidential authority, and contrary to the Fourth Amendment of the US constitution which protects privacy against unreasonable searches without a particular warrant, issued on "probable cause" (meaning evidence of a 50% likelihood of criminality).

The Church inquiry reported on the question of whether the Fourth Amendment restricts the mass-trawling and collection of international communications, which they discovered had been secretly conducted since the 1940s on telegrams<sup>12</sup>. The inquiry canvassed that inadvertent collection of Americans' data transmitted internationally was tolerable, if procedures were made for "minimization" of erroneous unwarranted access (and mistakes not used prejudicially against Americans).

<sup>9</sup> Government Communications Head-Quarters, the UK national cryptologic and information national security surveillance organisation, the descendent organisation from Bletchley Park.

<sup>10</sup> This practice started with the earliest cables for telegraphy in the 19<sup>th</sup> century and was a crucial aspect of Zimmerman Telegram affair which was influential in persuading America to join WW1. See: Desai, Anuj C. (2007), Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy, Stanford Law Review, 60 STAN L. REV. 553 (2007).

<sup>11</sup> STOA interception Capabilities 2000) and EuroParl ECHELON (2001) - reports by Duncan Campbell.

<sup>12</sup> No formal authority for the SHAMROCK collection (or sister MINARET trawling) programme existed but at the government's request a tape of all cables was delivered by courier every day to the NSA. See Snider, Britt L. (1999): Unlucky SHAMROCK - Recollections from the Church Committee's Investigation of NSA.

This idea was codified into the first Foreign Intelligence Surveillance Act of 1978 (FISA), which regulated the interception of international (and domestic) "foreign intelligence information" from telecommunications carriers. Collection of data by any nation from outside its territory is literally lawless and not restricted by any explicit international agreements.

#### 1.4. The post-9/11 context: extension of intelligence powers

After the terrorist attacks of September 11<sup>th</sup> 2001, privacy and data protection has been deeply challenged by exceptional measures taken in the name of security and the fight against terrorism.

The USA PATRIOT Act of 2001 was enacted by the US Congress on October 26, 2001, and its primary effect was to greatly extend law enforcement agencies' powers for gathering domestic intelligence inside the US. The revised Foreign Intelligence Surveillance Amendment Act of 2008 (FAA)<sup>13</sup> created a power of mass-surveillance specifically targeted at the data of non-US persons located outside the US. These aspects and their implications for EU citizens will be analysed in the following section (Section 2).

Numerous new surveillance programmes and modalities were further suggested to President Bush by NSA Director Gen. Hayden, without explicit authorization under statute, and approval was nevertheless given. Those programmes were retroactively deemed lawful in secret memoranda prepared by a relatively junior legal<sup>14</sup> official, under the Authorisation to Use Military Force (AUMF) for the war in Afghanistan and associated War on Terror operations.

Amongst these programmes was one codenamed Stellar Wind which involved placing fibre-optic cable "splitters" in major Internet switching centres, and triaging the enormous volumes of traffic in real-time with a small high-performance scanning computer (known as a deep-packet inspection box), which would send data filtered by this means back to the NSA. An AT&T technical supervisor in the San Francisco office was asked to assist in constructing such a facility ("Room 641A") and was concerned that this activity manifestly broke US Constitutional protections, because the cable carried domestic as well as international traffic. He took his story with documentation to the New York Times, which did not publish<sup>15</sup> the story for a year, until 2005 after the re-election of President Bush.

Other whistle-blowers from the NSA, CIA and FBI emerged with tales of illegal mass-surveillance via mobile phones, the Internet and satellites, and even revealed that phone calls of Barack Obama<sup>16</sup> (he was then Senator) and Supreme Court judges had been tapped. The controversy was exacerbated because two years before, a former National Security Adviser<sup>17</sup> had proposed a research programme for Total Information Awareness - T.I.A., a massive system of surveillance of all digital data, processed with advanced artificial intelligence algorithms to detect terrorist plots. Immediate adverse media commentary prompted the US Congress to de-fund research into T.I.A., but rumours persisted that it had been absorbed into an intelligence "black budget".

<sup>13</sup> US Congress (2008), Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, 122 Stat. 2436, Public Law 110-261, July 10, 2008.

<sup>14</sup> John Yoo, who similarly gave a secret opinion that water-boarding was not torture and thus permissible.

<sup>15</sup> New York Times, Bush Lets U.S. Spy on Callers Without Courts, Risen J, Lichtblau E, December 16, 2005.

<sup>16</sup> Huffington Post, Russ Tice, Bush-Era Whistleblower, Claims NSA Ordered Wiretap Of Barack Obama In 2004, 20<sup>th</sup> June 2013.

<sup>17</sup> Admiral John Poindexter, convicted in the Iran/Contra affair of the 1980s and pardoned by President Reagan.

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When the "warrantless wiretapping" allegations surfaced in a series of press reports from The New York Times, The Los Angeles Times, and The Wall Street Journal, the resonance with the supposedly cancelled T.I.A project intensified the level of public unease.

### 1.5. Edward Snowden's revelations and PRISM

On June 5<sup>th</sup> The Washington Post and The Guardian published a secret order made under s.215 of the PATRIOT Act requiring the Verizon telephone company to give the NSA details of all US domestic and international phone calls, and "on an ongoing basis". On June 6<sup>th</sup> the two newspapers revealed the existence of an NSA programme codenamed PRISM, which accessed data from leading brands of US Internet companies. By the end of the day a statement from Adm. Clapper (Director of NSA) officially acknowledged the PRISM programme and that it relied on powers under the FISA Amendment 2008 s.1881a/702. On June 9<sup>th</sup> Edward Snowden voluntarily disclosed his identity and a film interview with him was released.

The primary publication was in three newspapers: The Guardian, The Washington Post, and Der Spiegel. Four journalists have played a central role in obtaining, analysing and interpreting this material for the public: Barton Gellman, Laura Poitras, Jacob Appelbaum and Glenn Greenwald. They were joined by The Guardian (US edition), the New York Times in conjunction with ProPublica after the UK government insisted on destruction of The Guardian's copy of the Snowden material in their London offices, under the supervision of GCHQ<sup>18</sup>.

What can be referred to as the 'PRISM scandal' revealed a number of surveillance programmes, including:

#### 1.5.1 "Upstream"

The slides published from the Snowden material feature references to "Upstream" collection programmes by the NSA adumbrated by various codewords. Data is copied from both public and private networks to the NSA from international fibre-optic cables at landing points, and from central exchanges which switch Internet traffic between the major carriers, through agreements negotiated with (or legal orders served on) the operating companies (and probably also by intercepting cables on the seabed<sup>19</sup> when necessary).

#### 1.5.2 XKeyscore

The XKeyscore system was described in slides<sup>20</sup> (dated 2008<sup>21</sup>) published by The Guardian on the 31<sup>st</sup> of July. It is an "exploitation system/analytic framework", which enables searching a "3 day rolling buffer" of "full take" data stored at 150 global sites on 700 database servers. The system integrates data collected<sup>22</sup> from US embassy sites, foreign satellite and microwave transmissions (i.e. the system formerly known as ECHELON), and the "upstream" sources above.

The system indexes e-mail addresses, file names, IP addresses and port numbers, cookies, webmail and chat usernames and buddylists, phone numbers, and metadata from web

<sup>18</sup> It is outside the scope of this report to give a full analysis of what has been revealed, but in what follows it is assumed that the slides and documents are authentic, and no serious suggestions have been made to the contrary.

<sup>19</sup> The existence US submarines specially equipped for intercepting undersea cables was outlined in the 2000 EP ECHELON report cf. "Ivy Bells"

<sup>20</sup> <http://www.theguardian.com/world/interactive/2013/jul/31/nsa-xkeyscore-programme-full-presentation>

<sup>21</sup> A job advertisement was posted by a defence contractor in July 2013 indicating the programme is still active.

<sup>22</sup> <http://theweek.com/article/index/247684/whats-xkeyscore>

browsing sessions (including words typed into search engines and locations visited on Google Maps). The distinctive advantage of the system is that it enables an analyst to discover "strong selectors" (search parameters which identify or can be used to extract data precisely about a target), and to look for "anomalous events" such as someone "using encryption" or "searching for suspicious stuff".

The analyst can use the result of these index searches to "simply pull content from the site as required". This system of unified search allows retrospective trawling through 3 days (as of 2008) of a much greater volume of data than is feasible to copy back to the NSA.

The system can also do "Persona Session Collection" which means that an "anomalous event" potentially characteristic of a particular target can be used to trigger automatic collection of associated data, without knowledge of a "strong selector". It is also possible to find "all the exploitable machines in country X" by matching the fingerprints of configurations which show up in the data streams captured, with NSA's database of known software vulnerabilities. The slides also say it is possible to find all Excel spreadsheets "with MAC addresses coming out of Iraq"<sup>23</sup>.

Slide 17 is remarkable because it contained the first intimations of systemic compromise of encryption systems<sup>24</sup> (see BULLRUN below).

### 1.5.3 BULLRUN

BULLRUN<sup>25</sup> is the codename for a NSA programme for the last decade for an "aggressive multi-pronged effort to break into widely used encryption technologies", revealed in a joint Guardian<sup>26</sup>/New York Times story on September 1<sup>st</sup>. This programme has caused the greatest shock amongst the Internet technical security community of all the Snowden material so far, and frantic efforts are underway worldwide to assess which systems might be vulnerable, and to upgrade or change keys, ciphers and systems, not least because adversaries in hostile countries will now be trying to discover any backdoor mechanisms previously only known by the NSA.

The programme budget is \$250m per annum, and may use some of the following methods: collaboration with vendors of IT security products and software, mathematical cryptanalysis and "side-channel" attacks, forging of public-key certificates, infiltrating and influencing technical bodies towards adopting insecure standards, and likely use of coercive legal orders to compel introduction of "backdoors". It is important to stress that no evidence has emerged (yet) that the fundamental cipher algorithms in common use have been broken mathematically, however over the past few years doubts have grown about vulnerabilities in the complex "protocols" used to set-up and ensure compatibility amongst the software in common use.

FISA 702 may require a service provider to "immediately provide the government with all information, facilities, or assistance necessary to accomplish the acquisition" of foreign intelligence information, and thus on its face could compel disclosure of cryptographic keys,

<sup>23</sup> This seems anomalous because ostensibly Microsoft stopped incorporating the MAC address in the GUID (Global Unique Identifier – a way of generating a unique document index number) with Office 2000, and MAC addresses are not correlated to a particular country (unless somehow the NSA has obtained a comprehensive database or built one somehow specially for Iraq or is able to monitor and collect WiFi signals at long range and/or systematically).

<sup>24</sup> "Show me all the VPN startups in country X, and give me the data so I can decrypt and discover the users" – a VPN (Virtual Private Network) is an "encrypted tunnel" between the user's computer and a VPN provider, so Internet traffic notionally appears to originate from the VPN provider rather than the user, for privacy and security reasons.

<sup>25</sup> The corresponding codename of the similar GCHQ cryptographic penetration programme is EDGEHILL, curiously both names of battles from each country's civil war, and is outside the scope of this Note.

<sup>26</sup> <http://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security>

including the SSL keys used to secure data-in-transit by major search engines, social networks, webmail portals, and Cloud services in general. It is not yet known whether the power has been used in this way.

## 2. NSA PROGRAMMES AND RELATED LEGISLATION: CONTROVERSIES, GAPS AND LOOPHOLES AND IMPLICATIONS FOR EU CITIZENS

### KEY FINDINGS

- The complexity of inter-related US legislation pertaining to 'foreign intelligence information', and its interpretations by secret courts and executive legal memoranda, has led to unlawful practices affecting both US citizens and non-US citizens.
- The consequences of this legal uncertainty, and lack of Fourth Amendment protection for non-US citizens, means that no privacy rights for non-Americans are recognized by the US authorities under FISA
- The accelerating and already widespread use of Cloud Computing further undermines data protection for EU citizens.
- A review of the mechanisms that have been put in place in the EU for data export to protect EU citizens' rights shows that they actually function as loopholes.

When analysing known US surveillance programmes and related legislation from a Fundamental Rights perspective, the legal 'grey areas' fall into two categories, which constantly interact<sup>27</sup>:

- a lack of legal certainty resulting in privacy invasions and other potential abuses and malpractices inside the US, through ostensibly unintended effects on American citizens and legal residents;
- the intent of the US FISA (and PATRIOT) laws to acquire "foreign intelligence information", concerning people who are not American citizens or legal residents.

### 2.1. Legal gaps and uncertainties of US privacy law: implications for US citizens and residents

#### 2.1.1 The Third Party Doctrine and limitations to the Fourth Amendment

In two US cases in 1976 and 1979 the legal doctrine was established that for personal data entrusted to, or necessary to use a service provided by, a "third party" such as a bank or telephone company, there was no reasonable expectation of privacy, and therefore no warrant was required by the Fourth Amendment, which protects privacy against unreasonable searches without a particular warrant, issued on "probable cause" (meaning evidence of a 50% likelihood of criminality). Consequently such business records as credit-card transactions, bank statements, and itemized phone bills can be obtained by law

<sup>27</sup> Forgang, Jonathan D., (2009). "The Right of the People": The NSA, the FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas, Fordham Law Review, Volume 78, Issue 1, Article 6, 2009.

enforcement authorities through administrative procedures authorized by the law enforcement agency rather than an independent judge, and no "probable cause" has to be evidenced.

This doctrine has been subject to continuous criticism throughout the development of mobile communications which track individuals' location, Internet services which record website browsing and search-engine activity, and social networks in which merely the structure and dynamics of social interaction reveal intimate<sup>28</sup> details of private life<sup>29</sup>. Obviously these conditions could not have been foreseen by courts in the 1970s, yet every challenge so far to overturn the doctrine has been unsuccessful.

Such privacy concerns were increased by s.215 of the PATRIOT Act 2001, that attracted considerable controversy. It allows security authorities to obtain "tangible" business records from companies under a secret judicial order. Although secret non-judicial orders to obtain "non-content" data (i.e. "metadata") were already available under a procedure called a 'National Security Letter', s.215 is applicable to any kind of "tangible" data held by a great variety of private-sector businesses.

After the first revelations about the PRISM programme, Gen. Alexander (Director of the NSA) confirmed over two public hearings of Congressional intelligence review committees that the NSA collects (both domestic and international) telephone call metadata from all major carriers and maintains a database of all such calls for five years<sup>30</sup>. By the NSA's own account it uses this data for the sole purpose of deciding whether there is a "reasonable articulable suspicion" of a connection to a terrorist investigation. The database is searched for whether a candidate target telephone number is within "three hops" (i.e. when there exists a "chain" of calls sometime over a 5 year period) to a nexus of numbers previously associated with terrorism.

#### 2.1.2 CDRs and the 'Relevance Test'

So far, the greatest legislative controversy in the US about Snowden's revelations is not in fact about PRISM, but about the indiscriminate blanket collection of all telephone metadata (CDRs - call-detail-records), which appears to exceed the terms of the PATRIOT statute. Data can only be acquired under s.215 in the first place if it meets the standard that it must be "relevant" to an authorised investigation. The PATRIOT Act was amended in 2006 to include the relevance standard, with the intention of limiting the collection of data<sup>31</sup>, but it appears to have been interpreted as a justification for massive data collection.

The rationale behind this collection is therefore questionable: how is it possible to justify collection of the entire database in the first place, on the basis of establishing that a particular suspect's number has a 3-hop connection to terrorism? As expressed succinctly

<sup>28</sup> Agarwal, A., Rambow, O. & Bhardwaj, N. (2009) Predicting Interests of People on Online Social Networks, CSE 2009: International Conference on Computational Science and Engineering.

<sup>29</sup> Mislove, A., Viswanath, B., Gummadi, K.P. & Druschel, P. You are who you know: inferring user profiles in online social networks, Proceedings of the Third ACM International Conference on Web Search and Data Mining ACM, 2010, pp. 251-260.

<sup>30</sup> The New York Times revealed on 1st September, from a different source than Snowden that the company AT&T has retained records of all long-distance and international calls since 1987, and provides these records to US Drug Enforcement Agency investigations under a secret programme codenamed HEMISPHERE. Retention of such records in the EU, beyond the 2-year maximum specified in the Data Retention Directive 2006, would be illegal under the e-Privacy 2002 Directive (and earlier 1998 "ISDN" Directive) requirement for such data to be erased or made anonymous when any legitimate business purpose has expired.

<sup>31</sup> According to Rep. Sensenbrenner, Patriot Act Architect Criticizes NSA's Data Collection, NPR August 20th 2013.



by one advocate: "they were conducting suspicion-less searches to obtain the suspicion the FISA court required to conduct searches"<sup>32</sup>.

Problems that emerged from FISA were left to the interpretation (in secret proceedings) of the Foreign Intelligence Surveillance Court (FISC and the higher Review court FISCR) whose judges are appointed solely by the Chief Justice of the Supreme Court. It appears that the FISA courts agree with the government's argument that it is common in investigations for some indefinitely large corpus of records to be considered "relevant", in order to discover the actual evidence. Some official declassifications of the secret FISC(R) Opinions are in progress, but have not so far explained this logical anomaly.

### 2.1.3. 'Direct Access' to data-centres granted for surveillance purposes?

The companies named in the PRISM slides issued prompt denials of "direct access" to their datacentres, mentioned in the "marketing" slides that revealed PRISM's existence. Their position was that they were simply complying with a mandatory court order, and they had never heard of the PRISM codename (which is not surprising since this was an NSA codeword for a Top Secret programme). Microsoft asserted that they only responded to requests referencing specific account identifiers, and Google and Facebook denied they had "black boxes" stationed in their networks giving "direct access". The companies are constrained by the secrecy provisions of s.702, on pain of contempt or even espionage charges<sup>33</sup>. Google and Microsoft are now suing the government for permission to publish a breakdown of the number of persons affected by FISA orders.

However there is no substantive inconsistency between the carefully wordsmithed (and apparently co-ordinated<sup>34</sup>) company denials and the reports of PRISM. The phrase "direct access" was likely intended to distinguish this modality from "upstream" collection (see above), not necessarily implying a literal capability to extract data without the company's knowledge. However, such literal "direct access" is not precluded by the 702 statute, and it may be that this has already occurred with some other companies, or may in future be permitted by the FISC.

A critical further development resulted from a keen observation by The New York Times<sup>35</sup> on August 8<sup>th</sup> that in the targeting procedures published on June 20<sup>th</sup>, the "selectors" used to specify the information to be accessed under 702 could include arbitrary search terms. This ought not to be surprising from a plain reading of the statute, but it emphasized that Americans' (and of course non-Americans') privacy could be implicated in arbitrary trawls through a mass of data, rather than access being confined to account identifiers judged 50% likely to be non-American. A further story disclosed<sup>36</sup> that at the government's request in 2011 the FISA court reversed an earlier ruling and thenceforth permitted arbitrary search terms even if these included targeting factors characteristic of Americans.

<sup>32</sup> <https://www.eff.org/deeplinks/2013/09/government-releases-nsa-surveillance-docs-and-previously-secret-fisa-court>

<sup>33</sup> <http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance>

<sup>34</sup> The phrasing of statements from Google and Facebook have many concordances which strongly suggest they are derived from a common text.

<sup>35</sup> <http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?pagewanted=1&hp>

<sup>36</sup> [http://www.washingtonpost.com/politics/federal-government-report-surveillance-court-ruling-allowed-nsa-search-of-domestic-email/2013/09/08/4d9c8bb8-18c0-11e3-80ac-96205c6b45a\\_story.html](http://www.washingtonpost.com/politics/federal-government-report-surveillance-court-ruling-allowed-nsa-search-of-domestic-email/2013/09/08/4d9c8bb8-18c0-11e3-80ac-96205c6b45a_story.html)

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Thus it appears that the theoretical protections, which in law existed only for Americans, have been very substantially undermined<sup>37</sup> by successively expansive government requests to the court.

#### 2.1.4 Intelligence Agencies' 'Black Budget': scale and costs of US capabilities

On August 31<sup>st</sup>, The Washington Post published details from the secret ("black") budget<sup>38</sup> of the US intelligence community, which amounted to \$50bn per annum, together with a breakdown of expenditure into various categories. It was reported that the US had spent \$500bn on secret intelligence since 9/11. The NSA's budget is about \$10bn per annum, but it surprised commentators that the CIA's budget has rapidly grown to \$15bn, exceeding that of the NSA.

### 2.2. Situation of non-US citizens and residents (non 'USPERs')

It is striking that so far in the evolution of the 'Snowden affair', domestic US political commentary has almost exclusively referred to the rights of Americans. This is not a rhetorical trope and is meant literally - no reciprocity ought to be assumed<sup>39</sup> (in law or popular discourse) which extends rights further<sup>40</sup>. The rights of non-Americans have scarcely been mentioned in the US media<sup>41</sup> or legislature. It is even more surprising that careful analysis of the FISA 702 provisions clearly indicates that there exist two different regimes of data processing and protection: one for US citizens and residents ("USPERs"), another one without any protection whatsoever for non-US citizens and residents ("non-USPERs").

#### 2.2.1 The political definitions of 'foreign intelligence information'

The FISA definition of "foreign intelligence information" has been amended several times to include specific and explicit categories for e.g. money laundering, terrorism, weapons of mass-destruction, but has always included two limbs which seem almost unlimited in scope. When the terms are unwound it includes<sup>42</sup>:

information with respect to a foreign-based political organization or foreign territory that relates to, and if concerning a United States person is necessary to the conduct of the foreign affairs of the United States. [emphasis added]

This definition is of such generality that from the perspective of a non-American it appears any data of assistance to US foreign policy is eligible, including expressly political surveillance over ordinary lawful democratic activities.

<sup>37</sup> Cloud, Morgan (2005), A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment, Ohio State Journal of Criminal Law, Vol 3:33 2005.

<sup>38</sup> [http://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcddc09410972\\_story.html](http://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcddc09410972_story.html)

<sup>39</sup> Corradino, Elizabeth A., (1989), Fordham Law Review, The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far? Volume 57, Issue 4, Article 4, January, 1989.

<sup>40</sup> Cole, David, (2003), Georgetown Law: The Scholarly Commons, Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens? 25 T. Jefferson L. Rev. 367-388.

<sup>41</sup> Kenneth Roth (Dir. of Human Rights Watch) 4th September 2013: "...recognize the privacy rights of non-Americans outside the United States".

<sup>42</sup> 50 USC §1801(e)(2)(B) - <http://www.law.cornell.edu/uscode/text/50/1801>

### 2.2.2. Specific powers over communications of non-US persons

To end the public controversy<sup>43</sup> over "warrantless wiretapping" of Americans, the US Congress enacted<sup>44</sup> the interim Protect America Act (PAA) in 2007, which amended FISA 1978, and created a new power targeted at the communications of non-US persons located outside the territory of the US (i.e. the 95% of the rest-of-the-world). The most heated political difficulty was over whether telecommunications companies had broken statute law regulating the privacy of their subscribers by co-operating. Depending on the contested legitimacy of the use of the Authorization for Use of Military Force (AUMF) to effect surveillance, which had impinged on Americans, the companies were potentially liable for billions of dollars of damages. The telecommunications companies and the Internet service providers industry were adamant that complete civil immunity was their price for future co-operation. It is here critical to underline that this controversy was about the effects on the privacy of Americans, and that the surveillance of foreigners outside the US, through their communications routed to or via the US, was an assumed fait accompli and national prerogative<sup>45</sup>.

### 2.2.3. The Fourth Amendment does not apply to non-USPERs outside the US

The connection between the controversy over the s.215 PATRIOT Act power and the use of the FISA 702 power in the PRISM programme can now be explained. The database of 5 years of details of domestic and international calls was used to establish a counter-terrorist justification (according to the "three hops" principle). A second database was then checked of a directory the NSA maintains of telephone numbers believed to belong to Americans. If that check indicated the number was probably not that of an American, then the contents of that telephone call could be listened to with any further authorisation, under the FISA 702 law. Otherwise, if the number seemed probably that of an American, a further particular warrant for the interception would have to be obtained (under a different section of FISA), justifying the intrusion to a much higher legal standard, and with reference to the circumstances of the individual case.

However a close reading of s.215 shows that an alternative purpose (other than a connection to terrorism) is "to obtain foreign intelligence information not concerning a United States person"<sup>46</sup>. From a non-US perspective this may be an important point which has not so far featured in any of the analysis made in the US, nor is it clear how this provision would interact with the already tangled skein of contested legality. However it is a further illustration of US legislation which discriminates between the protections afforded by the Constitution to US citizens, and everybody else.

Some remarkable interviews have been given by former NSA Director Gen. Hayden, in which he stressed that "the Fourth Amendment - that prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause - is not an international treaty"<sup>47</sup>, and that the US enjoys a "home field advantage" of untrammelled access to foreign communications routed via US territory, or foreign data stored there.

<sup>43</sup> Bloom, Stephanie Cooper (2009), What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform, Public Interest Law Journal Vol 18:269.

<sup>44</sup> Congressional Research Service (2007), P.L. 110-55, the Protect America Act of 2007: Modifications to the Foreign Intelligence Surveillance Act, August 23, 2007.

<sup>45</sup> Congressional Research Service (2007), P.L. 110-55 the Protect America Act of 2007: Modifications to the Foreign Intelligence Surveillance Act, August 23, 2007 and Congressional Research Service – Liu, Edward C. (2013), Reauthorization of the FISA Amendments Act, 7-5700, R42725, January 2, 2013.

<sup>46</sup> <http://www.law.cornell.edu/uscode/text/50/1861>

<sup>47</sup> CBS News 30th June 2013; for further discussion see YOUNG (2003) Op.cit.

These statements sit uncomfortably with speeches and statements made by US State Department officials prior to 2012 at fora including the Council of Europe's "Octopus" conference on Cybercrime, and the annual International Conference of Privacy and Data Protection Commissioners. These statements lauded the protections afforded by the Fourth Amendment<sup>48</sup>, and since they were directed at an international audience to provide reassurance about America's respect for privacy, in retrospect they can only be construed as deceptive<sup>49</sup>. The author publicly challenged one representative in 2012 to state categorically that the Fourth Amendment applied to non-US persons (located outside the US), and they fell silent.

#### 2.2.4. Cloud computing risks for non-US persons

The interim Protect America Act of 2007 mentioned above was set to expire shortly before the Presidential election of 2008, and its scope was limited to interception of telephony and Internet access providers. Candidate-in-waiting Obama gave his approval to a bipartisan agreement to put PAA and its immunities for telecommunications companies on a permanent basis with the FISA Amendments Act 2008, which was enacted in July 2008.

When FAA was introduced, it contained an extra three words that apparently went unnoticed and unremarked by anyone<sup>50</sup>. By introducing "remote computing services" (a term defined in ECPA 1986 dealing with law enforcement access to stored communications), the scope was dramatically widened from Internet communications and telephony to include Cloud computing.

Cloud computing can be defined in general terms as the distributed processing of data on remotely located computers accessed through the Internet. From 2007 Internet industry marketing evangelized the benefits of Cloud computing to business, governments and policy-makers, beginning with Google and then rapidly followed by Microsoft and others, becoming a new business software sector.

In 2012 the LIBE Committee commissioned a briefing Note on "Fighting Cybercrime and Protecting Privacy in the Cloud" from the Centre for European Policy Studies (CEPS) and the Centre d'Etudes sur les Conflits, Liberté et Sécurité (CCLS), to which the author was invited to contribute<sup>51</sup>. Sections of the Note clearly asserted that Cloud computing and related US regulations presented an unprecedented threat to EU data sovereignty.

The Note specifically underlined<sup>52</sup> the following:

- (Cloud providers) cannot fulfil any of the privacy principles on which Safe Harbour is founded. This was never satisfactorily resolved by the Commission before the agreement was hastily concluded over the objections of European DPAs. As a result

<sup>48</sup> See: Medina, M. Isabel, (2008) *Indiana Law Journal, Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment* Volume 83, Issue 4, Article 14, January, 2008.

<sup>49</sup> In U.S. Ambassador to the EU (2012), *Remarks by William E Kennard*, Forum Europe's 3rd Annual European Data Protection and Privacy Conference, December 4, 2012, the assurances given regarding criminal law do not apply to FISA, which is unmentioned, see similarly: US State Department (2012), *Five Myths Regarding Privacy and Law Enforcement Access to Personal Information in the EU and the US*.

<sup>50</sup> For discussion of RCS under ECPA see: Pell, Stephanie K. (2012), *Systematic government access to private-sector data in the United States*, International Data Privacy Law, 2012, Vol. 2, No. 4.

<sup>51</sup> Bigo Didier, Boulet Gertjan, Bowden Caspar, Carrera Sergio, Jeandesboz Julien, Scherrer Amandine (2012), *Fighting cyber crime and protecting privacy in the cloud*, Study for the European Parliament, PE 462.509.

<sup>52</sup> Similar strong warnings were given by Hoboken, J.V.J., Arnbak, A.M., Van Eijk, N.A.N.M (2012), *Cloud Computing in Higher Education and Research Institutions and the USA Patriot Act*, IVIR, Institute for Information Law, University of Amsterdam, November 2012 (English Translation). See also warnings of FAA incompatibility with ECHR in 2010: LoConte, Jessica (2010), *FISA Amendments Act 2008: Protecting Americans by Monitoring International Communications--Is It Reasonable?*, Pace International Law Review Online Companion 1-1-2010.

many US cloud providers advertise Safe Harbour certification with insupportable claims that this legalizes transfers of EU data into US clouds, and since 2009 several have altered their self-certification filings to claim the oxymoronic status of Safe-Harbour-as-a-Processor. The Article 29 Data Protection Working Party (WP29) have clarified that this is insufficient in their recent opinion

- Cloud providers are transnational companies subject to conflicts of international public law. Which law they choose to obey will be governed by the penalties applicable and exigencies of the situation, and in practice the predominant allegiances of the company management. So far, almost all the attention on such conflicts has been focussed on the US PATRIOT Act, but there has been virtually no discussion of the implications of the US Foreign Intelligence Surveillance Amendment Act of 2008. §1881a of FAA for the first time created a power of mass-surveillance specifically targeted at the data of non-US persons located outside the US, which applies to Cloud computing. Although all of the constituent definitions had been defined in earlier statutes, the conjunction of all of these elements was new.....the most significant change escaped any comment or public debate altogether. The scope of surveillance was extended beyond interception of communications, to include any data in public cloud computing as well. This change occurred merely by incorporating "remote computing services" into the definition of an "electronic communication service provider"
- ...very strong implications on EU data sovereignty and the protection of its citizens' rights. The implications for EU Fundamental Rights flow from the definition of "foreign intelligence information", which includes information with respect to a foreign-based political organization or foreign territory that relates to the conduct of the foreign affairs of the United States. In other words, it is lawful in the US to conduct purely political surveillance on foreigners' data accessible in US Clouds. The root problem is that cloud computing breaks the forty year old legal model for international data transfers. The primary desideratum would be a comprehensive international treaty guaranteeing full reciprocity of rights, but otherwise exceptions ("derogations") can be recognized in particular circumstances providing there are safeguards appropriate to the specific situation. Cloud computing breaks the golden rule that "the exception must not become the rule". Once data is transferred into a Cloud, sovereignty is surrendered. In summary, it is hard to avoid the conclusion that the EU is not addressing properly an irrevocable loss of data sovereignty, and allowing errors made during the Safe Harbour negotiations of 2000 to be consolidated, not corrected.
- Particular attention should be given to US law that authorizes the surveillance of Cloud data of non-US residents. The EP should ask for further enquiries into the US FISA Amendments Act, the status of the 4th Amendment with respect to NONUSPERS, and the USA PATRIOT Act (especially s.215).
- The EP should consider amending the DP Regulation to require prominent warnings to individual data subjects (of vulnerability to political surveillance) before EU Cloud data is exported to US jurisdiction. No data subject should be left unaware if sensitive data about them is exposed to a 3rd country's surveillance apparatus. The existing derogations must be dis-applied for Cloud because of the systemic risk of loss of data sovereignty. The EU should open new negotiations with the US for recognition of a human right to privacy which grants Europeans equal protections in US courts.
- The EU needs an industrial policy for autonomous capacity in Cloud computing. The DG INFSO Communication of October 2012 is on this matter not in tune with the challenges analysed in this study. A target could be that by 2020, 50% of EU public services should be running on Cloud infrastructure solely under EU jurisdictional

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control.

The study also underlined that since the SWIFT affair, an EU "High-Level Contact Group" has been conducting talks in 2011 with the US authorities on an "Umbrella" agreement intended to cover transfers of data for law enforcement purposes. So far, the US has been adamant that this will not cover access to EU data from US private parties by US authorities, and thus would exclude precisely the situation of Cloud computing<sup>53</sup>.

#### 2.2.5. There are no privacy rights recognised by US authorities for non-US persons under FISA

The acquisition of foreign intelligence information under the PRISM programme requires adherence to "minimization"<sup>54</sup> and "targeting"<sup>55</sup> procedures, which were revealed (unredacted) by The Guardian on 20<sup>th</sup> June. Together these provide strong evidence that there are no privacy rights for non-Americans recognized by the US authorities under PRISM and related programmes. The revealed documents are heavily tautologous and replete with bureaucratic jargon, but a close reading does not discover any acknowledgement of rights for non-Americans whatsoever. One therefore suspects that US operational practice places no limitations on exploiting or intruding on a non-US person's privacy, if the broad definitions of foreign intelligence information are met.

Moreover in a May 2012 letter to the Congressional intelligence review committees<sup>56</sup> the government states that:

Because NSA has already made a "foreignness" determination for these selectors in accordance with its FISC-approved targeting procedures, FBI's targeting role differs from that of NSA. FBI is not required to second-guess NSA's targeting determinations...

The versions of the targeting procedures revealed are generic, but the American Civil Liberties Union (ACLU)<sup>57</sup> obtained redacted copies of slides related to FBI staff training that referred specifically to FISAAA for counter-terrorism purposes. The letter continues:

Once acquired, all communications are routed to NSA. NSA also can designate the communications from specified selectors acquired through PRISM collection to be "dual-routed" to other intelligence Community elements. (emphasis added)

This means that agencies such as the CIA, amongst others of the sixteen agencies of the US intelligence community, can receive their own streams of data to store and analyse, which the NSA has roughly filtered for a 50% likelihood of "foreignness". No reporting on documents from Snowden, or other commentary, has referred to this "dual-routing" or their mission purposes.

According to the leaked "targeting procedures" (dated 2009) of FAA, an NSA database of telephone numbers and Internet identifiers<sup>58</sup> is used to eliminate known Americans from

<sup>53</sup> EU-US Data Protection Non-Paper On Negotiations During 2011

<sup>54</sup> <http://www.theguardian.com/world/interactive/2013/jun/20/exhibit-a-procedures-nsa-document>

<sup>55</sup> <http://www.theguardian.com/world/interactive/2013/jun/20/exhibit-a-procedures-nsa-document>

<sup>56</sup> [https://www.aclu.org/files/assets/ltr\\_to\\_hpSCI\\_chairman\\_rogers\\_and\\_ranking\\_member\\_ruppersberger\\_scan.pdf](https://www.aclu.org/files/assets/ltr_to_hpSCI_chairman_rogers_and_ranking_member_ruppersberger_scan.pdf) (declassified 21<sup>st</sup> Aug 2013)

<sup>57</sup> ACLU FOIA request (2010), Introduction to FISA Section 702, (2010). US Dept. of Justice, decl. December 2010.

being inadvertently targeted by s.702. Analysts may only proceed to access "content data" under the 702 power if there is more than a 50% likelihood the target is not American and located outside the US, because the Fourth Amendment was held not to apply. Otherwise a particular warrant must be applied for under a different section of FISA.

This shows that the "probable cause" requirement for evidence of a 50% likelihood of criminality was converted into a 50% probability of nationality. This interpretation was first visible in a FISA Court of Review (FISCR) decision of 2008, released briefly in redacted form in 2010, and then apparently withdrawn from the official website (but a copy<sup>59</sup> had been kept by a transparency NGO).

The reasoning of FISCR was that foreign intelligence surveillance of targets reasonably believed to be outside of the US qualifies for a "special needs" exception<sup>60</sup> to the Fourth Amendment warrant requirement. The constitutionality of that judgement is being contested in a number of lawsuits brought by US civil liberties organisations, because this "coin-flip" criterion implies many unconstitutional searches of Americans' communications.

### 2.3. Data export: false solutions and insufficient safeguards

In order to conclude this section, the author would like to draw the Parliament's attention to certain difficulties with current derogations and/or safeguards proposed as solutions to the implications for EU Citizens underlined above. This subsection aims to highlight the loopholes and gaps in several mechanisms that have been put in place for data export. In the author's view, these mechanisms should not be seen as guarantees for the protection of EU citizens' rights.

#### 2.3.1 Safe Harbour, BCRs for processors and Cloud Computing

The EU/US Safe Harbour Agreement of 2000 implemented a process for US companies to comply with the EU Directive 95/46/EC on the protection of personal data. If a US company makes a declaration of adherence to the Safe Harbour Principles then an EU Controller may export data to that company (although a written contract is still required).

Sometimes described as a 'simultaneous unilateral declaration', the Agreement left ambiguous whether it covered the situation of remote processing of data inside the US, on instruction from Controllers inside the EU. Especially in the case of Cloud computing, such remote processors were most unlikely to be capable of giving effect to the Safe Harbour Principles, which, the US argued, thus became void. Did the deal still apply, for unrestricted export of EU data for remote processing under essentially a self-regulatory framework? In 2000, the EU Commission over-ruled objections from civil society and some DPAs, to conclude a deal.

The US negotiators in the Department of Commerce worked closely with US trade lobbies, on a series of "FAQs" for US companies to interpret the Agreement to marginalize EU privacy rights, building in loopholes on such questions as what counted as identifiable data, refusing rights of access, and avoiding any duty of finality or right-of-deletion. Safe

<sup>58</sup> This appears to be a different database, a directory, rather than the metadata controversially acquired under s.215. It is not known how this is compiled (for example from network surveillance) or under what authority, but evidently it is more than commercial telephone directories.

<sup>59</sup> [www.fas.org/irp/agency/doj/fisa/fiscr082208.pdf](http://www.fas.org/irp/agency/doj/fisa/fiscr082208.pdf)

<sup>60</sup> Anzalda, Matthew A. and Gannon, Jonathan W. (2010), *In re Directives... Judicial Recognition of Certain Warrantless Foreign Intelligence Surveillance* (paywall), Texas Law Review, Vol 88:1599 2010.

Harbour proved so Byzantine that no EU citizen navigated the bureaucracy to lodge a complaint for many years.

The official EU review study<sup>61</sup> on Safe Harbour of 2004, in a slight treatment of FISA, did not parse the political non-USPER meanings of foreign intelligence information discussed above, and stated that "the controversial provisions of the USA PATRIOT Act are essentially irrelevant for Safe Harbour data flows".

Much of the legal analysis supporting the theory that Safe Harbour applies to Cloud computing can be traced to the work of Dr. Christopher Kuner<sup>62</sup>, for many years the organizer of a Brussels lobby of privacy officers from predominantly US multinational companies, which became influential with the Commission and DPAs. Dr. Kuner also represented the International Chamber of Commerce in EU discussions over data protection, and has advised major Internet companies as clients. Kuner's textbook of Data Protection commercial law was cited in a Microsoft-sponsored study<sup>63</sup>, arguing that Safe Harbour sufficed for Cloud processing. The US recently re-iterated this view expressly<sup>64</sup>.

Against this background, a working group of DPAs began discussions about 2009 with major Internet companies on a new proposed derogation which could subsume Cloud computing. This became known as Binding Corporate Rules for data processors.

The concept was that a US (or other Third Country) Cloud service vendor could obtain a security accreditation for an entire software platform from a reputable auditor, and together with a "check-list" of organizational procedures drafted by WP29<sup>65</sup>, an EU Controller could then lawfully export personal data outside the EU into the foreign-controlled Cloud. The checklist imposed (and in limited respects strengthened) similar conditions and wording to that which had already been created by the Commission for "model" clauses (see below).

Perhaps in response to warnings about FISA, two months before Snowden, WP29 issued an apparently minor "clarification", adding<sup>66</sup> that the checklist

"only creates an information process that does not legitimate transfers per se. In the case of a conflict of laws, one shall refer to the international treaties and agreements applicable to such matter" [emphasis added].

It does not seem very prudent to place the burden of responsibility for such a critical evaluation<sup>67</sup> of conflicts of international law on a foreign corporation with strong vested interests, that may be subject to espionage charges for compliance with EU law.

<sup>61</sup> Dhont J., Asinari M.V.P., Poulet Y., Reidenberg J., Bygrave L. (2004), Safe Harbour Decision Implementation Study, European Commission, Internal Market DG Contract PRS/2003/A0-7002/E/27.

<sup>62</sup> Kuner, Christopher (2008), Membership of the US Safe Harbor Program by Data Processors, The Center For Information Policy Leadership, Hunton & Williams LLP.

<sup>63</sup> Hon, W. Kuan and Millard, Christopher (2012), Data Export in Cloud Computing - How Can Personal Data Be Transferred Outside the EEA? The Cloud of Unknowing, Part 4, QMUL Cloud Legal Project: "There is some uncertainty regarding whether the Safe Harbor framework applies to transfers to a US processor (as opposed to controller), such as a cloud provider. The better view is that it does...". See also Walden, Ian (2011), Accessing Data in the Cloud: The Long Arm of the Law Enforcement Agent, QMUL Cloud Legal Project, Research Paper No. 74/2011, footnote 119.

<sup>64</sup> US Department of Commerce International Trade Administration (2013), Clarifications Regarding the U.S.-EU Safe Harbor Framework and Cloud Computing.

<sup>65</sup> ART29WP - Article 29 Data Protection Working Party (2012), Working Document 02/2012 setting up a table with the elements and principles to be found in Processor Binding Corporate Rules, WP 195 Adopted on 6 June 2012.

<sup>66</sup> ART29WP - Article 29 Data Protection Working Party (2013), Explanatory Document On The Processor Binding Corporate Rules, WP 204, Adopted On 19 April 2013.

<sup>67</sup> For relevant discussion of such conflicts see: Radsan, John A. (2007), The Unresolved Equation of Espionage and International Law, Michigan Journal of International Law, Vol 28:595 2007.



BCRs-for-processors might sound like a variant of the existing BCRs (for Controllers), but in actuality they are vastly more risky for Europeans' privacy. The strategic risk to EU data sovereignty, which arises directly from the concept of BCRs-for-processors, is that the global Cloud industry is dominated by software "platforms" from Microsoft, Google, Amazon, and a few others. Microsoft's goal for its public-sector sales-force from 2010 was to compete for every contract for data processing by governments<sup>68</sup>. The cost savings for Cloud processing can be massive (sometimes one tenth the cost of processing "on-premises" by the Controller according to industry marketing claims). The cost savings are from equipment, overhead, operational staff (increasingly expensive for leading cyber-security expertise), and the major Cloud providers can take advantage of economies of scale, and higher average utilization by spreading processing loads across time-zones globally. Therefore there is already, and will be further, a competitive imperative to migrate European "on-premises" data to Cloud processing, and so far the EU has almost no significant indigenous software platforms that can compete (on cost, features, or reliability) with the leading US providers. The exception to this gloomy picture is free and open-source software, which has produced powerful Cloud "stacks" competitive with proprietary software and services.

In this light, BCR-for-processors can be seen as an expedient strategy both for the Commission and for Data Protection Authorities (DPAs) who wish to maintain the semblance of legal control over EU data, and for the Cloud providers who find the existing EU Data Protection regime generally inconvenient, especially for tax purposes<sup>69</sup>. The Commission promoted the legal status of the BCR-for-processors concept in the text of the new draft Regulation<sup>70</sup>. Subsequently, national DPAs would have no alternative but to accept their validity once issued. So far, only a few dozen of the existing Controller BCRs have been approved<sup>71</sup>, and the standard of compliance already is not reassuring<sup>72</sup>.

### 2.3.2. Model Contracts

From 2001 the EU Commission drafted approved "model" clauses for inclusion in contracts both for Controllers and Processors located outside the EU, intended to guarantee privacy rights for individuals comparable to those they would have if the data remained inside the EU.

The conceptual flaw in this general approach is the supposition that computer systems can be "audited" to guarantee the three essential requirements of information security: Confidentiality, Integrity and Availability. Whilst integrity<sup>73</sup> and availability of data are technically and logically verifiable properties, confidentiality is not. It is impossible to know with certainty whether either an "insider" or external unauthorised party has seen or copied data. Even if data is encrypted with a

<sup>68</sup> The author was Chief Privacy Adviser to Microsoft's forty National Technology Officers (in charge of government liaison) until 2011, and received special sales training emphasizing the Cloud goal of competing for all government business, irrespective of the sensitivity of the data. On querying whether this was a mistake, the goal was reaffirmed.

<sup>69</sup> Large US Internet companies tend to "forum-shop" for MS with low-tax and low-privacy regimes. If these do not coincide, corporate attorney must draft onerously complex contracts to comply with the technicalities of "model" contracts.

<sup>70</sup> BCRs (Art.43) are no longer categorized as a "derogation" (Art.44), see: European Commission (2012), Proposal for a General Data Protection Regulation, 25.1.2012, COM(2012) 11 final 2012/0011.

<sup>71</sup> A rough sample of a dozen of these companies showed that most do not provide the actual BCR terms online as required.

<sup>72</sup> The author filed a test complaint to the Luxembourg DPA about lack of any knowledge about BCRs by PayPal's privacy support staff (PayPal cannot comply with the terms of the BCR if their staff are unaware even of its existence or obligations). Despite several reminders, after one year there is still no news of the outcome of the investigation.

<sup>73</sup> To check integrity, a "hash function" is computed over the data which functions as a verifiable "fingerprint".

mathematically strong cipher, the algorithm implementation may have software defects, or the key may be leaked or stolen secretly.

The revelations about PRISM dramatically illustrate the folly of this legal stratagem. No force of law operating in civil cases on private parties can guarantee privacy rights in the face of an adversary such as the NSA trying to breach them, and operating lawfully in its own terms.

Clause 5(d)<sup>74</sup> provided that the processor had to tell the EU exporter about any "legally binding request" for data unless that was prohibited, such as a prohibition under criminal law to preserve the confidentiality of a criminal investigation. The wording "such as" invites a reading that national security laws a fortiori override any contractual obligation. Although the EU retained powers to terminate the transfers, this required a basis of evidence to do so, and thus the structural temptation for turning a blind-eye was incorporated.

Every organizational actor has an incentive to turn a blind-eye under these arrangements. The Commission so they can maintain "high standards" of data protection are observed, DPAs so as not to expose their technical limits and exhaust their limited resources in expensive legal actions, Member States whose security hierarchies benefit from access to US counter-terror information, and business in EU and the US who simply want to transact without awkward questions of state mass-surveillance continually arising. Even EU civil society<sup>75</sup> seemed quiescent since ECHELON, and has mostly focussed on consumer rights<sup>76</sup> instead of meaningfully questioning the implications for Fundamental Rights and sovereignty in commercial data-flows to the US.

As a legal mechanism for guaranteeing rights and obtaining damages for poor security or privacy practices, such contracts (and their "model" clauses) have proved useless in so far as they have not given rise to litigation. In most situations where an EU Controller might want to obtain monetary damages from a Third Country processor/controller, the reputation damage they could suffer in the marketplace (e.g. from a data breach becoming known) would be very unlikely to be recouped. In theory, this disincentive would be removed by the new draft Regulations' requirement<sup>77</sup> to notify DPAs of data breaches, but DPAs have signalled that they will not necessarily require data subjects to be informed (and thus effectively make the incident public knowledge), partly in order to shield Controllers from disproportionate reputation damage. When disputes are settled out of court without publicity, it undercuts the function that contract litigation would perform, of informing Controllers about the reliability of those to whom they might export data. Data subjects of course have no idea when their rights may have been infringed under this approach.

<sup>74</sup> Commission decision of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC (2002/16/EC).

<sup>75</sup> The notable exception is the Chaos Computer Club of Germany.

<sup>76</sup> With promising exceptions such as the short-lived International Campaign Against Mass Surveillance of 2005 (website now defunct – but a copy preserved [here](#)), and the generally high level of civil society vigilance in Germany, which must be taken as read for avoidance of repetition.

<sup>77</sup> The current breach notification requirement under the revised e-Privacy Directive only applies to telecommunications companies and Internet Services Providers, not to information society services provided through websites like social networks and search engines and general data Controllers.

### 3. STRATEGIC OPTIONS AND RECOMMENDATIONS FOR THE EUROPEAN PARLIAMENT

#### 3.1. Reducing exposure and growing a European Cloud

As explained earlier, the mechanism of BCRs-for-processors, apparently tailor-made to ease the flow of EU data into Third Country cloud computing, is not sufficient to safeguard rights. It contains a loophole that condones unlawful surveillance. It is thus quite surprising that at various stages of development, the concept has been endorsed by the Article 29 Data Protection Working Party<sup>78</sup> (WP29), the European Data Protection Supervisor<sup>79</sup> (EDPS), and the French Commission Nationale de l'Informatique et des Libertés (CNIL) which led their formulation. No evidence has emerged that these DPAs understood the structural shift of data sovereignty<sup>80</sup> implied by Cloud computing. Rather, an unrealistic and legalistic view has allowed the protection of EU citizens to be neglected.

#### Recommendations:

- Prominent notices should be displayed by every US web site offering services in the EU to inform consent to collect data from EU citizens. The users should be made aware that the data may be subject to surveillance (under FISA 702) by the US government for any purpose which furthers US foreign policy. A consent requirement will raise EU citizen awareness and favour growth of services solely within EU jurisdiction. This will thus have economic impact on US business and increase pressure on the US government to reach a settlement.
- Since the other main mechanisms for data export (model contracts, Safe Harbour) are not protective against FISA or PATRIOT, they should be revoked and re-negotiated. In any case, the requirement above for informed consent after a prominent warning notice should apply to any data collected, in the past or in the future, by a public or private sector EU controller, before it can be exported to the US for Cloud processing.
- A full industrial policy for development of an autonomous European Cloud computing capacity based on free/open-source software should be supported. Such a policy would reduce US control over the high end of the Cloud e-commerce value chain and EU online advertising markets. Currently European data is exposed to commercial manipulation, foreign intelligence surveillance and industrial espionage. Investments in a European Cloud will bring economic benefits as well as providing the foundation for durable data sovereignty.

#### 3.2. Reinstating 'Article 42'

The published<sup>81</sup> new Regulation omitted 'Art.42' (according to the numbering of a draft<sup>82</sup> leaked two months before the final version), reportedly after very heavy lobbying by US

<sup>78</sup> ART29WP - Article 29 Data Protection Working Party (2012), Opinion on Cloud Computing, WP 196, Adopted July 1st 2012

<sup>79</sup> European Data Protection Supervisor - Hustinx, Peter (2010), Data Protection and Cloud Computing Under EU Law, speech, Third European Cyber Security Awareness Day, BSA, European Parliament, 13 April 2010, Panel IV: Privacy and Cloud Computing.

<sup>80</sup> De Filippi, Primavera, and McCarthy, Smari (2012), Cloud Computing: Centralization and Data Sovereignty, European Journal of Law and Technology 3, 2.

<sup>81</sup> European Commission (2012), Proposal for a General Data Protection Regulation, 25.1.2012, COM(2012) 11 final 2012/0011.

<sup>82</sup> European Commission (2011), [Draft] Proposal for a General Data Protection Regulation

interests<sup>83</sup>. Article 42 prohibits Third Countries (such as the United States and other non-EU Member States) from accessing EU personal data where required by a non-EU court or administrative authority without prior authorization by an EU Data Protection Authority. The article has been described as the "anti-FISA clause".

Recommendations: The deterrent effect of 'Art.42' should be assessed before it is reinstated, and in particular, the following issues should be addressed:

- Even though Art.42 in principle mitigates controversial aspects of FISA, it is doubtful that this measure would be effective, because compliance would expose the leadership of US companies to charges of espionage. As the Yahoo CEO declared recently: "we faced jail if we revealed NSA surveillance secrets"<sup>84</sup>.
- The efficiency of sanctions as a compliance mechanism should also be evaluated from the perspective of net economic gains and losses. As an illustration, the EU competition authority prosecuted a long case against Microsoft for its monopoly of local-area networking, resulting in a fine of \$1bn (the largest ever applied by the EU). The corporate attorney responsible for that strategy was not fired for incompetence but promoted to a Deputy General Counsel. The reason is that Microsoft's profits over the previous decade from the monopoly were conservatively twenty times the size of the enormous fine, and this was foreseen by Microsoft's legal strategists.
- If a major Cloud provider failed to comply with Art.42, it could result in irreversible but secret violation of the fundamental rights of millions of citizens, and the Regulation ought to make this a serious criminal offence. At the moment, most MS transpositions of EU 95/46 treat DP offences as minor matters, and some MS do not implement criminal sanctions at all. That is no deterrent against a calculated strategy to ignore EU law, weighed against the penalties applicable under US law.
- At a general level and beyond the specific scope of Art.42, the level of fines for infractions of the new Data Protection Regulation also need to be substantially increased. They were reduced to a 2% fine on the revenue of a corporation, from higher levels in leaked drafts. The example above of the Microsoft competition case shows that some companies have enormous resources and deep strategies that anticipate and incorporate even billion-dollar fines into their business plans. A fine level of 20% of global revenue may be needed to persuade such corporations to reckon seriously with Art.42 compliance.
- Even after BULLRUN, cryptography is probably intact in theory<sup>85</sup>, however it is not known which encryption implementations and products may have been rendered insecure. Therefore consideration should be given to extending the scope of 'Art.42' also to cover vendors of systems/products (as well as Controllers/Processors) in EU markets. Existing encryption security product accreditations, especially if influenced by NSA or GCHQ, must be regarded as suspect.

<sup>83</sup> Washington pushed EU to dilute data protection, Financial Times 12th June 2013.

<sup>84</sup> The Guardian 12th September 2013, [http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance?CMP=twl\\_gu](http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance?CMP=twl_gu)

<sup>85</sup> Otherwise the NSA would not expend so many resource to by-pass it by indirect means (unless that is a deception plan on an immense scale)

### 3.3. Whistle-Blowers' Protection and Incentives

**Recommendation:** Systematic protection and incentives for whistle-blowers should be introduced in the new Regulation. Whistle-blowers should be given strong guarantees of immunity and asylum, and awarded 25% of any fine consequently exacted<sup>86</sup>. The whistle-blower may have to live in fear of retribution from their country for the rest of the lives, and take precautions to avoid "rendition" (kidnapping). Ironically, US law already provides rewards of the order of \$100m for whistle-blowers exposing corruption (in the sphere of public procurement and price-fixing)<sup>87</sup>.

### 3.4. Institutional Reform

At a very early stage of consultation the EU Commission rejected the option of establishing a new central pan-European Data Protection Authority, because this appeared disproportionate to the requirement for Member States' subsidiarity. The option was chosen for an evolutionary development of WP29 into the new Data Protection Board. However an intermediate option could have been considered: the creation of a new central authority for cases involving major Third Country data-flows.

**Recommendation:** a central investigative service for cases involving major Third Country data-flows should be created. This service should be given authority and resources to initiate complex prosecutions against transnational companies, who often employ large legal teams to delay and appeal decisions over many years. National DPAs would retain jurisdiction over purely national affairs, and according to the principle of subsidiarity, could initiate their own national investigations, or refer a case to the central service.

### 3.5. Data Protection Authorities and Governance

The PRISM scandal and Snowden's revelations have not been the first warnings to EU institutions in relation to EU citizens' rights. Privacy activists for instance warned the Commission in 2000 that the Safe Harbour Agreement contained dangerous loopholes<sup>88</sup>. More recently, the above-mentioned note produced on Cloud Computing for the European Parliament's LIBE Committee clearly highlighted the loopholes of FISA and their consequences on EU citizens' rights and protection<sup>89</sup>.

The Committee even held a hearing<sup>90</sup> for the presentation of the Note, following a session on the EU Cybersecurity strategy on Feb 20<sup>th</sup> 2013. Afterwards MEPs asked for immediate proposals to meet the LIBE amendment deadline<sup>91</sup> on the Data Protection Regulation. However, from March onwards, the level of interest in the Note declined, and there seemed only a remote possibility that Parliament would support fundamental revisions of the DP regulation. Thanks to the PRISM scandal and Snowden's revelations, such warnings and

<sup>86</sup> This principle has a long history in law under the term *Qui Tam*.

<sup>87</sup> <http://www.theguardian.com/business/2010/oct/27/glaxosmithkline-whistleblower-wins-61m>

<sup>88</sup> The author (then as Director of FIPR) and others raised the question of whether Safe Harbour permitted "ECHELON"-type mass-surveillance with officials but received no answer.

<sup>89</sup> Bigo Didier, Boulet Gertjan, Bowden Caspar, Carrera Sergio, Jeandesboz Julien, Scherrer Amandine (2012), *Fighting cyber crime and protecting privacy in the cloud*, Study for the European Parliament, PE 462.509.

<sup>90</sup> 20.2.13 European Parliament LIBE hearing on Cybercrime/Cloud Report (video from 17:08:18)

<sup>91</sup> LIBE amendments 806/2531/2748/2950 of the new Regulation are derived from these proposals

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related concerns have gained a new legitimacy. The question remains why DPAs did not react.

In one hundred and fifty Opinions of WP29 issued since 9/11, only the first mentions the PATRIOT Act (in a footnote), and none FISA, or even the term 'foreign intelligence'. National DPAs<sup>92</sup>, the EDPS<sup>93</sup>, and other institutions<sup>94</sup> seemed to be unaware of US legislation or that PRISM was legally possible. They failed to sound the alarm for EU citizens, despite warnings<sup>95</sup>, and of course the widely reported US scandal before 2008. This may be because DPAs, ENISA<sup>96</sup>, and the Trust and Security Unit of DG-CONNECT<sup>97</sup>, are ambivalent whether the "national security" exemption of EU competency means they are – or are not – required to defend their citizens' privacy from Third Country intelligence agencies.

In their last state-of-play comments before Snowden, the EDPS noted the above mentioned LIBE proposed amendment for a drastic warning to data subjects before giving consent to Cloud transfers, but rejected<sup>98</sup> this on the grounds that it was not "technology neutral".

It appears the EU DPA institutions have some structural difficulties that need to be addressed. In particular, DPAs clearly lack capacities in technical expertise. Only a few dozen DPA staff (out of about two thousand across Europe) has an informatics background, let alone a post-graduate degree related to the computer and engineering science of privacy. There is a deeply-rooted view that because in general it is preferable to draft laws in a technology-neutral<sup>99</sup> way, this excuses regulators from understanding technical matters. For example, WP29 has never conducted any survey of advanced privacy-enhancing technologies, or issued any Opinion mandating their use, even in the face of persistent evidence of market failure for their voluntary adoption.

**Recommendations:** A reform of the EU Data Protection Authorities appointment system should be implemented. The new Regulation does not address this aspect. This is critical in order to prevent inertia and deadlock regarding technology-specific questions. Some options to improve the EU Data Protection governance and capacities could include:

- inclusion in the Data Protection Board of at least one special Commissioner with a mandate prioritizing defence of citizens' rights, with a small independent staff, perhaps directly elected by popular (but apolitical) vote at the time of European

<sup>92</sup> With the exception of German DPAs have who been vigilant. See: Weichert, Thilo (2011), Cloud Computing and Data Privacy, The Sedona Group Conference Working Group Series, February 2011. See also: International Working Group on Data Protection in Telecommunications (2012), Working Paper on Cloud Computing - Privacy and data protection issues - Sopot Memorandum, 51st meeting, 23-24 April 2012.

<sup>93</sup> Bowden, Caspar (2012), Is EU data safe in US Clouds? (slides), Academy of European Law, Trier September 2012. Both the EDPS and Deputy were present, as well as senior officials from the Council, Commission and other DPAs, who were emailed a copy afterwards.

<sup>94</sup> See: 28.6.12 - Green party hearing on DP (slides) (video t=2h43m); See also: 10.10.12 LIBE Interparliamentary Forum

<sup>95</sup> Bowden, Caspar (2011), Government Databases and Cloud Computing (slides), The Public Voice, Mexico, October 2011.

<sup>96</sup> On 14.6.13 ENISA Press Office replied to a question from the author to the Director, that defence against the NSA was outside their mandate, but probably realizing this position is untenable, on 6.9.13 issued a statement finessing the issue and incorrectly implying (footnote 21) that ENISA had warned of FISA-type risks in 2009.

<sup>97</sup> Statement made by responsible DG-CONNECT official at Cloud security workshop 28.5.13 convened to discuss author's warnings just before Snowden.

<sup>98</sup> European Data Protection Supervisor (2013), Additional EDPS Comments on the Data Protection Reform Package.

<sup>99</sup> European Data Protection Supervisor (2011), Opinion on the Communication - "A comprehensive approach on personal data protection in the European Union", Brussels, 14 January 2011.

elections, or by the Parliament;

- inclusion of a special technical Commissioner, nominated from the functional constituency of academic computer scientists specializing in privacy, and potentially another Commissioner from the field of Surveillance Studies, also with small independent staffs;
- a requirement that DP Commissioners must be appointed by national Parliaments and not the executive;
- a minimum quota for DPAs of 25% technical staff with suitable qualifications (or equivalent experience) with a career path<sup>100</sup> to the most senior positions;
- a subvention of funds to support the civil society sector, although great care must be taken to ring-fence this allocation. Funds should be distributed fairly and on merit, but avoiding the stifling effect of bureaucracy and the danger of institutional capture<sup>101</sup>. In the United States, the culture of philanthropy and mass-membership civil society supports four highly professional national NGOs<sup>102</sup>, with diverse approaches, which litigate test cases in privacy and freedom of information, and conduct world-class technical critique of government policies. In contrast, the EU still has a patchwork of dozens of NGOs, who with few resources and lacking the consistent capacity of a permanent research staff, did not campaign on FISA before Snowden

<sup>100</sup> DPAs object they are unable to hire or retain technical staff with current knowledge because their salaries cannot compete with the private sector. DPA career tracks could ensure a reasonable parity of remuneration between technical and legal staff, which would ameliorate this problem.

<sup>101</sup> For example the EU's "No Disconnect" strategy, obliges NGOs use consultants to prepare micro-managed formal bids, which effectively excludes small NGOs and is alienating to the spirit of civil society.

<sup>102</sup> The Electronic Frontier Foundation (EFF), The Electronic Privacy Information Center (EPIC), the American Civil Liberties Union (ACLU), and the Center for Democracy and Technology (CDT).

## CONCLUSION

As noted earlier, one of the most extraordinary aspects of the PRISM affair is that not only have the rights of non-Americans not been discussed in the US, they were not even discussed by the European media until well after the story first broke. The rights of non-Americans were rarely raised, and a casual reader would not understand that the intended target of surveillance was non-Americans, and that they had no rights at all.

It seems that the only solution which can be trusted to resolve the PRISM affair must involve changes to the law of the US, and this should be the strategic objective of the EU. Furthermore, the EU must examine with great care<sup>103</sup> the precise type of treaty instrument proposed in any future settlement with the US. Practical<sup>104</sup> but effective mechanisms are also needed to verify that disclosures of data to the US for justifiable law enforcement investigations are not abused.

In assessing the impact of the revelations, three technical considerations should be borne in mind in the search for effective responses.

(1) Data can only be processed whilst decrypted, and thus any Cloud processor can be secretly ordered under FISA 702 to hand over a key, or the information itself in its decrypted state. Encryption is futile to defend against NSA accessing data processed by US Clouds (but still useful against external adversaries such as criminal hackers). Using the Cloud as a remote disk-drive does not provide the competitiveness and scalability benefits of Cloud as a computation engine. There is no technical solution to the problem<sup>105</sup>.

(2) Exposing data in bulk to remote Cloud mass-surveillance forfeits data sovereignty, so confining data to the EU is preferable pending legal solutions. Although NSA has extensive capabilities to target particular systems inside the EU, this is harder and riskier to do. However basic reforms to the new Regulation are needed, otherwise in practice these two situations will be treated as equivalent, and Cloud business will go to lowest bidder.

(3) Although an EU-based company transacting in the US is also subject to conflicts between EU DP and the FISA law, in practice it is less likely they will be served with such secret orders, because the legal staff and management would be more likely to resist, and as EU-nationals are less threatened by US espionage laws. "Clouds" can be confined to a location, and arguments this would "balkanise"<sup>106</sup> the Internet confuses issues of censorship with the problem of keeping data private.

\* \* \*

The thoughts prompted in the mind of the public by the revelations of Edward Snowden cannot be unthought. We are already living in a different society in consequence. Everybody now knows, that the US intelligence community might know any personal secret in electronic data sent in range of the NSA. These developments could be profoundly destabilising for democratic societies, precluding exercise of basic political and human rights, and creating a new form of instantaneous and coercive Panoptic power.

<sup>103</sup> Regarding "inherent" Presidential powers without Congressional authority, see: Fein, Bruce (2007), *Presidential Authority to Gather Foreign Intelligence*, Presidential Studies Quarterly, March 2007.

<sup>104</sup> Wills Aidan and al., *Parliamentary Oversight of security and Intelligence Agencies in the EU*, Note for the European Parliament, PE 453.207

<sup>105</sup> The exotic technique of "homomorphic encryption" is sometimes proposed as a solution but has no commercial relevance since its systematic adoption would be uncompetitive, as it would slow down processing by many orders of magnitude

<sup>106</sup> U.S. Commerce Department (General Counsel) – Kerry, Cameron F. (2013), Keynote Address at the German Marshall Fund of the United States, 28th August 2013



There is a historical symmetry between the incursions on the Fourth Amendment rights of Americans, and the disregard for the human right to privacy of everyone else in the world. In the period leading up the US War of Independence of 1776 the British used "general warrants" which authorised any search without suspicion, and it was resentment<sup>107</sup> against this power and its abuse that motivated the subsequent Fourth Amendment to the US Constitution.

FISA 702 (aka §1881a) is a general warrant to collect data and trawl for information related to US foreign affairs, but Americans' privacy is legally sacrosanct (albeit in theory) unless the high legal threshold of "necessity" is met. What particularly galled the American revolutionaries was that ten years earlier a famous case in English law<sup>108</sup> had prohibited such general warrants. They regarded it as hypocrisy that laws they did not write, and could not change, protected the privacy of their rulers, but not colonial subjects. The same principle is at stake today.

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<sup>107</sup> <https://www.eff.org/files/filenode/all/generalwarrantsmemo.pdf>

<sup>108</sup> Entick vs. Carrington 1765

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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**Twenty-seventh session**

**Agenda items 2 and 3**

**Annual report of the United Nations High Commissioner  
for Human Rights and reports of the Office of the  
High Commissioner and the Secretary-General**

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **The right to privacy in the digital age**

#### **Report of the Office of the United Nations High Commissioner for Human Rights**

##### *Summary*

In its resolution 68/167, the General Assembly requested the United Nations High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council at its twenty-seventh session and to the General Assembly at its sixty-ninth session, with views and recommendations, to be considered by Member States. The present report is submitted pursuant to that request. The Office of the High Commissioner will also submit the report to the General Assembly at its sixty-ninth session, pursuant to the request of the Assembly.



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## I. Introduction

1. Digital communications technologies, such as the Internet, mobile smartphones and WiFi-enabled devices, have become part of everyday life. By dramatically improving access to information and real-time communication, innovations in communications technology have boosted freedom of expression, facilitated global debate and fostered democratic participation. By amplifying the voices of human rights defenders and providing them with new tools to document and expose abuses, these powerful technologies offer the promise of improved enjoyment of human rights. As contemporary life is played out ever more online, the Internet has become both ubiquitous and increasingly intimate.

2. In the digital era, communications technologies also have enhanced the capacity of Governments, enterprises and individuals to conduct surveillance, interception and data collection. As noted by the Special Rapporteur on the right to freedom of expression and opinion, technological advancements mean that the State's effectiveness in conducting surveillance is no longer limited by scale or duration. Declining costs of technology and data storage have eradicated financial or practical disincentives to conducting surveillance. The State now has a greater capability to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before.<sup>1</sup> In other words, the technological platforms upon which global political, economic and social life are increasingly reliant are not only vulnerable to mass surveillance, they may actually facilitate it.

3. Deep concerns have been expressed as policies and practices that exploit the vulnerability of digital communications technologies to electronic surveillance and interception in countries across the globe have been exposed. Examples of overt and covert digital surveillance in jurisdictions around the world have proliferated, with governmental mass surveillance emerging as a dangerous habit rather than an exceptional measure. Governments reportedly have threatened to ban the services of telecommunication and wireless equipment companies unless given direct access to communication traffic, tapped fibre-optic cables for surveillance purposes, and required companies systematically to disclose bulk information on customers and employees. Furthermore, some have reportedly made use of surveillance of telecommunications networks to target political opposition members and/or political dissidents. There are reports that authorities in some States routinely record all phone calls and retain them for analysis, while the monitoring by host Governments of communications at global events has been reported. Authorities in one State reportedly require all personal computers sold in the country to be equipped with filtering software that may have other surveillance capabilities. Even non-State groups are now reportedly developing sophisticated digital surveillance capabilities. Mass surveillance technologies are now entering the global market, raising the risk that digital surveillance will escape governmental controls.

4. Concerns have been amplified following revelations in 2013 and 2014 that suggested that, together, the National Security Agency in the United States of America and General Communications Headquarters in the United Kingdom of Great Britain and Northern Ireland have developed technologies allowing access to much global internet traffic, calling records in the United States, individuals' electronic address books and huge volumes of other digital communications content. These technologies have reportedly been deployed through a transnational network comprising strategic intelligence relationships between Governments, regulatory control of private companies and commercial contracts.

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<sup>1</sup> A/HRC/23/40, para. 33.



5. Following on the concerns of Member States and other stakeholders at the negative impact of these surveillance practices on human rights, in December 2013 the General Assembly adopted resolution 68/167, without a vote, on the right to privacy in the digital age. In the resolution, which was co-sponsored by 57 Member States, the Assembly affirmed that the rights held by people offline must also be protected online, and called upon all States to respect and protect the right to privacy in digital communication. It further called upon all States to review their procedures, practices and legislation related to communications surveillance, interception and collection of personal data, emphasizing the need for States to ensure the full and effective implementation of their obligations under international human rights law.

6. Also in resolution 68/167, the General Assembly requested the United Nations High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council at its twenty-seventh session and to the General Assembly at its sixty-ninth session, with views and recommendations, to be considered by Member States. The present report is submitted pursuant to that request. As mandated by resolution 68/167, the Office of the High Commissioner (OHCHR) will also submit the report to the Assembly at its sixty-ninth session.

## II. Background and methodology

7. Bearing in mind resolution 68/167, OHCHR participated in a number of events and gathered information from a broad range of sources. On 24 February 2014, the High Commissioner delivered a keynote presentation at an expert seminar on "The right to privacy in the digital age", which was co-sponsored by Austria, Brazil, Germany, Liechtenstein, Mexico, Norway and Switzerland, and facilitated by the Geneva Academy on International Humanitarian Law and Human Rights.

8. From November 2013 to March 2014, OHCHR engaged the United Nations University in a research project on the application of international human rights law to national regimes overseeing governmental digital surveillance. OHCHR is grateful to the University, and acknowledges its major substantive contribution to the preparation of the present report through the research project.

9. As part of an open consultation, on 27 February 2014, OHCHR addressed a questionnaire to Member States through their Permanent Missions in Geneva and in New York; international and regional organizations; national human rights institutions; non-governmental organizations; and business entities. In its questionnaire, OHCHR invited inputs on the issues as addressed by the General Assembly in its resolution 68/167. A dedicated OHCHR webpage was created in order to make available the questionnaire and all contributions for public consultation, as well as to provide further opportunity for input. Contributions were received from 29 Member States from all regions, five international and/or regional organizations, three national human rights institutions, 16 non-governmental organizations and two private sector initiatives.<sup>2</sup>

10. Many of the contributions referred in detail to existing national legislative frameworks and to other measures taken to ensure respect for and protection of the right to privacy in the digital age, as well as to initiatives to establish and implement procedural safeguards and effective oversight. Some contributions referred to challenges encountered

<sup>2</sup> All contributions are available at [www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx](http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx).

in the implementation of the right to privacy in the digital age, and provided suggestions for initiatives at the international level. They included encouragement to the Human Rights Committee to update its relevant general comments, in particular on article 17 of the International Covenant on Civil and Political Rights; the establishment by the Human Rights Council of a special procedures mandate on the right to privacy; and/or the engagement of existing relevant special procedures mandate holders in joint or individual initiatives to address issues related to the right to privacy in the context of digital surveillance and to provide good-practice guidance.

11. Pursuant to the request made in General Assembly resolution 68/167, the present report offers reflections and recommendations based on an assessment of information available at the time of drafting, drawing also on the wealth of material reflected in the diverse range of contributions received.

### **III. Issues relating to the right to privacy in the digital age**

12. As recalled by the General Assembly in its resolution 68/167, international human rights law provides the universal framework against which any interference in individual privacy rights must be assessed. Article 12 of the Universal Declaration of Human Rights provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” The International Covenant on Civil and Political Rights, to date ratified by 167 States, provides in article 17 that “no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”. It further states that “everyone has the right to the protection of the law against such interference or attacks.”

13. Other international human rights instruments contain similar provisions. Laws at the regional and national levels also reflect the right of all people to respect for their private and family life, home and correspondence or the right to recognition and respect for their dignity, personal integrity or reputation. In other words, there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.

14. While the mandate for the present report focused on the right to privacy, it should be underscored that other rights also may be affected by mass surveillance, the interception of digital communications and the collection of personal data. These include the rights to freedom of opinion and expression, and to seek, receive and impart information; to freedom of peaceful assembly and association; and to family life – rights all linked closely with the right to privacy and, increasingly, exercised through digital media. Other rights, such as the right to health, may also be affected by digital surveillance practices, for example where an individual refrains from seeking or communicating sensitive health-related information for fear that his or her anonymity may be compromised. There are credible indications to suggest that digital technologies have been used to gather information that has then led to torture and other ill-treatment. Reports also indicate that metadata derived from electronic surveillance have been analysed to identify the location of targets for lethal drone strikes. Such strikes continue to raise grave concerns over compliance with international human rights law and humanitarian law, and accountability for any violations thereof. The linkages between mass surveillance and these other effects on human rights, while beyond the scope of the present report, merit further consideration.

**A. The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence**

15. Several contributions highlighted that, when conducted in compliance with the law, including international human rights law, surveillance of electronic communications data can be a necessary and effective measure for legitimate law enforcement or intelligence purposes. Revelations about digital mass surveillance have, however, raised questions around the extent to which such measures are consistent with international legal standards and whether stronger surveillance safeguards are needed to protect against violations of human rights. Specifically, surveillance measures must not arbitrarily or unlawfully interfere with an individual's privacy, family, home or correspondence; Governments must take specific measures to ensure protection of the law against such interference.

16. A review of the various contributions received revealed that addressing these questions requires an assessment of what constitutes interference with privacy in the context of digital communications; of the meaning of "arbitrary and unlawful"; and of whose rights are protected under international human rights law, and where. The sections below address issues that were highlighted in various contributions.

**1. Interference with privacy**

17. International and regional human rights treaty bodies, courts, commissions and independent experts have all provided relevant guidance with regard to the scope and content of the right to privacy, including the meaning of "interference" with an individual's privacy. In its general comment No. 16, the Human Rights Committee underlined that compliance with article 17 of the International Covenant on Civil and Political Rights required that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. "Correspondence should be delivered to the addressee without interception and without being opened or otherwise read".<sup>3</sup>

18. It has been suggested by some that the conveyance and exchange of personal information via electronic means is part of a conscious compromise through which individuals voluntarily surrender information about themselves and their relationships in return for digital access to goods, services and information. Serious questions arise, however, about the extent to which consumers are truly aware of what data they are sharing, how and with whom, and to what use they will be put. According to one report, "a reality of big data is that once data is collected, it can be very difficult to keep anonymous. While there are promising research efforts underway to obscure personally identifiable information within large data sets, far more advanced efforts are presently in use to re-identify seemingly 'anonymous' data. Collective investment in the capability to fuse data is many times greater than investment in technologies that will enhance privacy." Furthermore, the authors of the report noted that "focusing on controlling the collection and retention of personal data, while important, may no longer be sufficient to protect personal privacy", in part because "big data enables new, non-obvious, unexpectedly powerful uses of data".<sup>4</sup>

19. In a similar vein, it has been suggested that the interception or collection of data about a communication, as opposed to the content of the communication, does not on its

<sup>3</sup> *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI, para. 8.

<sup>4</sup> Executive Office of the President of the United States, "Big Data: Seizing Opportunities, Preserving Values", May 2014 (available from [www.whitehouse.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_may\\_1\\_2014.pdf](http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf)), p. 54.

own constitute an interference with privacy. From the perspective of the right to privacy, this distinction is not persuasive. The aggregation of information commonly referred to as "metadata" may give an insight into an individual's behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication. As the European Union Court of Justice recently observed, communications metadata "taken as a whole may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained."<sup>5</sup> Recognition of this evolution has prompted initiatives to reform existing policies and practices to ensure stronger protection of privacy.

20. It follows that any capture of communications data is potentially an interference with privacy and, further, that the collection and retention of communications data amounts to an interference with privacy whether or not those data are subsequently consulted or used. Even the mere possibility of communications information being captured creates an interference with privacy,<sup>6</sup> with a potential chilling effect on rights, including those to free expression and association. The very existence of a mass surveillance programme thus creates an interference with privacy. The onus would be on the State to demonstrate that such interference is neither arbitrary nor unlawful.

## 2. What is "arbitrary" or "unlawful"?

21. Interference with an individual's right to privacy is only permissible under international human rights law if it is neither arbitrary nor unlawful. In its general comment No. 16, the Human Rights Committee explained that the term "unlawful" implied that no interference could take place "except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant".<sup>7</sup> In other words, interference that is permissible under national law may nonetheless be "unlawful" if that national law is in conflict with the provisions of the International Covenant on Civil and Political Rights. The expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of this concept, the Committee explained, "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".<sup>8</sup> The Committee interpreted the concept of reasonableness to indicate that "any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case".<sup>9</sup>

22. Unlike certain other provisions of the Covenant, article 17 does not include an explicit limitations clause. Guidance on the meaning of the qualifying words "arbitrary or unlawful" nonetheless can be drawn from the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights;<sup>10</sup> the practice of the Human Rights Committee as reflected in its general comments, including

<sup>5</sup> Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, Judgment of 8 April 2014, paras. 26-27, and 37. See also Executive Office of the President, "Big Data and Privacy: A Technological Perspective" (available from [www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/peast\\_big\\_data\\_and\\_privacy\\_-\\_may\\_2014.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/peast_big_data_and_privacy_-_may_2014.pdf)), p. 19.

<sup>6</sup> See European Court of Human Rights, *Weber and Saravia*, para. 78; *Malone v. UK*, para. 64.

<sup>7</sup> *Official Records of the General Assembly* (see footnote 3), para. 3.

<sup>8</sup> *Ibid.*, para. 4.

<sup>9</sup> Communication No. 488/1992, *Toonan v. Australia*, para. 8.3; see also communications Nos. 903/1999, para 7.3, and 1482/2006, paras. 10.1 and 10.2.

<sup>10</sup> See E/CN.4/1985/4, annex.

Nos. 16, 27, 29, 34, and 31, findings on individual communications<sup>11</sup> and concluding observations;<sup>12</sup> regional and national case law;<sup>13</sup> and the views of independent experts.<sup>14</sup> In its general comment No. 31 on the nature of the general legal obligation on States parties to the Covenant, for example, the Human Rights Committee provides that States parties must refrain from violation of the rights recognized by the Covenant, and that “any restrictions on any of [those] rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”<sup>15</sup> The Committee further underscored that “in no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”

23. These authoritative sources point to the overarching principles of legality, necessity and proportionality, the importance of which also was highlighted in many of the contributions received. To begin with, any limitation to privacy rights reflected in article 17 must be provided for by law, and the law must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available.<sup>16</sup> Moreover, the limitation placed on the right (an interference with privacy, for example, for the purposes of protecting national security or the right to life of others) must be shown to have some chance of achieving that goal. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Furthermore, any limitation to the right to privacy must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary.

24. Governments frequently justify digital communications surveillance programmes on the grounds of national security, including the risks posed by terrorism. Several contributions suggested that since digital communications technologies can be, and have been, used by individuals for criminal objectives (including recruitment for and the financing and commission of terrorist acts), the lawful, targeted surveillance of digital communication may constitute a necessary and effective measure for intelligence and/or law enforcement entities when conducted in compliance with international and domestic law. Surveillance on the grounds of national security or for the prevention of terrorism or other crime may be a “legitimate aim” for purposes of an assessment from the viewpoint of article 17 of the Covenant. The degree of interference must, however, be assessed against the necessity of the measure to achieve that aim and the actual benefit it yields towards such a purpose.

25. In assessing the necessity of a measure, the Human Rights Committee, in its general comment No. 27, on article 12 of the International Covenant on Civil and Political Rights, stressed that that “the restrictions must not impair the essence of the right [...] the relation

<sup>11</sup> For example, communication No. 903/1999, 2004, *Van Hulst v. The Netherlands*.

<sup>12</sup> CCPR/C/USA/CO/4.

<sup>13</sup> For example, European Court of Human Rights, *Uzun v. Germany*, 2 September 2010, and *Weber and Soravia v. Germany*, para. 4; and Inter-American Court of Human Rights, *Escher v. Brazil*, Judgment, 20 Nov. 2009.

<sup>14</sup> See A/HRC/13/37 and A/HRC/23/40. See also International Principles on the Application of Human Rights to Communications Surveillance, available at <https://cn.necessaryandproportionate.org/text>.

<sup>15</sup> CCPR/C/21/Rev.1/Add.13, para. 6.

<sup>16</sup> CCPR/C/21/Rev.1/Add.9, paras. 11 – 16. See also A/HRC/14/46, annex, practice 20.

between right and restriction, between norm and exception, must not be reversed.”<sup>17</sup> The Committee further explained that “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them.” Moreover, such measures must be proportionate: “the least intrusive instrument amongst those which might achieve the desired result”.<sup>18</sup> Where there is a legitimate aim and appropriate safeguards are in place, a State might be allowed to engage in quite intrusive surveillance; however, the onus is on the Government to demonstrate that interference is both necessary and proportionate to the specific risk being addressed. Mass or “bulk” surveillance programmes may thus be deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime. In other words, it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened; namely, whether the measure is necessary and proportionate.

26. Concerns about whether access to and use of data are tailored to specific legitimate aims also raise questions about the increasing reliance of Governments on private sector actors to retain data “just in case” it is needed for government purposes. Mandatory third-party data retention – a recurring feature of surveillance regimes in many States, where Governments require telephone companies and Internet service providers to store metadata about their customers’ communications and location for subsequent law enforcement and intelligence agency access – appears neither necessary nor proportionate.<sup>19</sup>

27. One factor that must be considered in determining proportionality is what is done with bulk data and who may have access to them once collected. Many national frameworks lack “use limitations”, instead allowing the collection of data for one legitimate aim, but subsequent use for others. The absence of effective use limitations has been exacerbated since 11 September 2001, with the line between criminal justice and protection of national security blurring significantly. The resulting sharing of data between law enforcement agencies, intelligence bodies and other State organs risks violating article 17 of the Covenant, because surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another. A review of national practice in government access to third-party data found “when combined with the greater ease with which national security and law enforcement gain access to private-sector data in the first place, the expanding freedom to share that information among agencies and use it for purposes beyond those for which it was collected represents a substantial weakening of traditional data protections.”<sup>20</sup> In several States, data-sharing regimes have been struck down by judicial review on such a basis. Others have suggested that such use limitations are a good practice to ensure the effective discharge of a State’s obligations under article 17 of the Covenant,<sup>21</sup> with meaningful sanctions for their violation.

<sup>17</sup> CCPR/C/21/Rev.1/Add.9, paras. 11 – 16. See also European Court of Human Rights, *Handyside v. the United Kingdom*, para. 48; and *Klass v. Germany*, para. 42.

<sup>18</sup> CCPR/C/21/Rev.1/Add.9, paras. 11 – 16.

<sup>19</sup> See opinion of the Advocate-General Cruz Villalón of the Court of Justice of the European Union in joint cases C-293/12 and C-594/12, which suggests that the Directive 2006/24/EU (on the retention of data generated or processed in connection with the provision of electronic communications services) is “as a whole” in violation of the Charter of Fundamental Rights of the European Union because it fails to impose strict limits on such data retention. See also CCPR/C/USA/CO/4, para. 22.

<sup>20</sup> Fred H. Cate, James X. Dempsey and Ira S. Rubinstein, “Systematic government access to private-sector data”, *International Data Privacy Law*, vol. 2, No. 4, 2012, p. 198.

<sup>21</sup> See A/HRC/14/46, annex, practice 23.

## B. Protection of the law

28. Paragraph 2 of article 17 of the International Covenant on Civil and Political Rights explicitly states that everyone has the right to the protection of the law against unlawful or arbitrary interference with their privacy. This implies that any communications surveillance programme must be conducted on the basis of a publicly accessible law, which in turn must comply with the State's own constitutional regime and international human rights law.<sup>22</sup> "Accessibility" requires not only that the law is published, but that it is sufficiently precise to enable the affected person to regulate his or her conduct, with foresight of the consequences that a given action may entail. The State must ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that (a) are publicly accessible; (b) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (c) are sufficiently precise, specifying in detail the precise circumstances in which any such interference may be permitted, the procedures for authorizing, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected; and (d) provide for effective safeguards against abuse.<sup>23</sup>

29. Consequently, secret rules and secret interpretations – even secret judicial interpretations – of law do not have the necessary qualities of "law".<sup>24</sup> Neither do laws or rules that give the executive authorities, such as security and intelligence services, excessive discretion; the scope and manner of exercise of authoritative discretion granted must be indicated (in the law itself, or in binding, published guidelines) with reasonable clarity. A law that is accessible, but that does not have foreseeable effects, will not be adequate. The secret nature of specific surveillance powers brings with it a greater risk of arbitrary exercise of discretion which, in turn, demands greater precision in the rule governing the exercise of discretion, and additional oversight. Several States also require that the legal framework be established through primary legislation debated in parliament rather than simply subsidiary regulations enacted by the executive – a requirement that helps to ensure that the legal framework is not only accessible to the public concerned after its adoption, but also during its development, in accordance with article 25 of the International Covenant on Civil and Political Rights.<sup>25</sup>

30. The requirement of accessibility is also relevant when assessing the emerging practice of States to outsource surveillance tasks to others. There is credible information to suggest that some Governments systematically have routed data collection and analytical tasks through jurisdictions with weaker safeguards for privacy. Reportedly, some Governments have operated a transnational network of intelligence agencies through interlocking legal loopholes, involving the coordination of surveillance practice to outflank the protections provided by domestic legal regimes. Such practice arguably fails the test of lawfulness because, as some contributions for the present report pointed out, it makes the operation of the surveillance regime unforeseeable for those affected by it. It may undermine the essence of the right protected by article 17 of the International Covenant on Civil and Political Rights, and would therefore be prohibited by article 5 thereof. States have also failed to take effective measures to protect individuals within their jurisdiction

<sup>22</sup> See *ibid.*, annex.

<sup>23</sup> CCPR/C/USA/CO/4, para. 22. See also European Court of Human Rights, *Malone v the United Kingdom*, No. 8691/79, 2 August 1984, paras. 67 and 68; and *Weber and Saravia v Germany*, application no. 54934/00, 29 June 2006, in which the Court lists minimum safeguards that should be set out in statute law.

<sup>24</sup> See CCPR/C/USA/CO/4, para. 22.

<sup>25</sup> See also A/HRC/14/46.

against illegal surveillance practices by other States or business entities, in breach of their own human rights obligations.

### C. Who is protected, and where?

31. The extraterritorial application of the International Covenant on Civil and Political Rights to digital surveillance was addressed in several of the contributions received. Whereas it is clear that certain aspects of the recently revealed surveillance programmes, for instance, will trigger the territorial obligations of States conducting surveillance, additional concerns have been expressed in relation to extraterritorial surveillance and the interception of communications.

32. Article 2 of the International Covenant on Civil and Political Rights requires each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Human Rights Committee, in its general comment No. 31, affirmed that States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.<sup>26</sup> This extends to persons within their "authority".<sup>27</sup>

33. The Human Rights Committee has been guided by the principle, as expressed even in its earliest jurisprudence, that a State may not avoid its international human rights obligations by taking action outside its territory that it would be prohibited from taking "at home".<sup>28</sup> This position is consonant with the views of the International Court of Justice, which has affirmed that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State "in the exercise of its jurisdiction outside its own territory",<sup>29</sup> as well as articles 31 and 32 of the Vienna Convention on the Law of Treaties. The notions of "power" and "effective control" are indicators of whether a State is exercising "jurisdiction" or governmental powers, the abuse of which human rights protections are intended to constrain. A State cannot avoid its human rights responsibilities simply by refraining from bringing those powers within the bounds of law. To conclude otherwise would not only undermine the universality and essence of the rights protected by international human rights law, but may also create structural incentives for States to outsource surveillance to each other.

34. It follows that digital surveillance therefore may engage a State's human rights obligations if that surveillance involves the State's exercise of power or effective control in

<sup>26</sup> CCPR/C/21/Rev.1/Add.13, para. 10.

<sup>27</sup> See *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XIX, para. 12.2; see also annex XX. See also CCPR/CO/78/ISR, para. 11; CCPR/CO/72/NET, para. 8; CCPR/CO/81/BEL, para. 6; and Inter-American Commission of Human Rights, *Coard et al. v. the United States*, case No. 10.951, Report No. 109/99, 29 September 1999, paras. 37, 39, 41 and 43.

<sup>28</sup> See *Official Records of the General Assembly, Thirty-sixth Session* (see footnote 27), annex XIX, paras. 12.2-12.3, and annex XX, para. 10.3.

<sup>29</sup> Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, of 9 July 2004 (A/ES-10/273 and Corr.1), paras. 107-111. See also International Court of Justice, case concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment, 2005, p. 168.



relation to digital communications infrastructure, wherever found, for example, through direct tapping or penetration of that infrastructure. Equally, where the State exercises regulatory jurisdiction over a third party that physically controls the data, that State also would have obligations under the Covenant. If a country seeks to assert jurisdiction over the data of private companies as a result of the incorporation of those companies in that country, then human rights protections must be extended to those whose privacy is being interfered with, whether in the country of incorporation or beyond. This holds whether or not such an exercise of jurisdiction is lawful in the first place, or in fact violates another State's sovereignty.

35. This conclusion is equally important in the light of ongoing discussions on whether "foreigners" and "citizens" should have equal access to privacy protections within national security surveillance oversight regimes. Several legal regimes distinguish between the obligations owed to nationals or those within a State's territories, and non-nationals and those outside.<sup>30</sup> or otherwise provide foreign or external communications with lower levels of protection. If there is uncertainty around whether data are foreign or domestic, intelligence agencies will often treat the data as foreign (since digital communications regularly pass "off-shore" at some point) and thus allow them to be collected and retained. The result is significantly weaker – or even non-existent – privacy protection for foreigners and non-citizens, as compared with those of citizens.

36. International human rights law is explicit with regard to the principle of non-discrimination. Article 26 of the International Covenant on Civil and Political Rights provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" and, further, that "in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." These provisions are to be read together with articles 17, which provides that "no one shall be subjected to arbitrary interference with his privacy" and that "everyone has the right to the protection of the law against such interference or attacks", as well as with article 2, paragraph 1. In this regard, the Human Rights Committee has underscored the importance of "measures to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance."<sup>31</sup>

#### **D. Procedural safeguards and effective oversight**

37. Article 17, paragraph 2 of the International Covenant on Civil and Political Rights states that everyone has the right to the protection of the law against unlawful or arbitrary interference or attacks. The "protection of the law" must be given life through effective procedural safeguards, including effective, adequately resourced institutional arrangements. It is clear, however, that a lack of effective oversight has contributed to a lack of accountability for arbitrary or unlawful intrusions on the right to privacy in the digital environment. Internal safeguards without independent, external monitoring in particular have proven ineffective against unlawful or arbitrary surveillance methods. While these safeguards may take a variety of forms, the involvement of all branches of government in

<sup>30</sup> See for example, in the United States, the Foreign Intelligence Surveillance Act S1881(a); in the United Kingdom, the Regulation of Investigatory Powers Act 2000, s8(4); in New Zealand, the Government Security Bureau Act 2003, s. 15A; in Australia, the Intelligence Services Act S. 9; and in Canada, the National Defence Act, S. 273.64 (1).

<sup>31</sup> CCPR /C/USA/CO/4, para. 22.

the oversight of surveillance programmes, as well as of an independent civilian oversight agency, is essential to ensure the effective protection of the law.

38. Judicial involvement that meets international standards relating to independence, impartiality and transparency can help to make it more likely that the overall statutory regime will meet the minimum standards that international human rights law requires. At the same time, judicial involvement in oversight should not be viewed as a panacea; in several countries, judicial warranting or review of the digital surveillance activities of intelligence and/or law enforcement agencies have amounted effectively to an exercise in rubber-stamping. Attention is therefore turning increasingly towards mixed models of administrative, judicial and parliamentary oversight, a point highlighted in several contributions for the present report. There is particular interest in the creation of "public interest advocacy" positions within surveillance authorization processes. Given the growing role of third parties, such as Internet service providers, consideration may also need to be given to allowing such parties to participate in the authorization of surveillance measures affecting their interests or allowing them to challenge existing measures. The utility of independent advice, monitoring and/or review to help to ensure strict scrutiny of measures imposed under a statutory surveillance regime has been highlighted positively in relevant jurisprudence. Parliamentary committees also can play an important role; however, they may also lack the independence, resources or willingness to discover abuse, and may be subject to regulatory capture. Jurisprudence at the regional level has emphasized the utility of an entirely independent oversight body, particularly to monitor the execution of approved surveillance measures.<sup>32</sup> In 2009, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism suggested, therefore, that "there must be no secret surveillance system that is not under review of an independent oversight body and all interferences must be authorized through an independent body."<sup>33</sup>

## E. Right to an effective remedy

39. The International Covenant on Civil and Political Rights requires States parties to ensure that victims of violations of the Covenant have an effective remedy. Article 2, paragraph 3 (b) further specifies that States parties to the Covenant undertake "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy". States must also ensure that the competent authorities enforce such remedies when granted. As the Human Rights Committee emphasized in its general comment No. 31, failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>34</sup> Moreover, cessation of an ongoing violation is an essential element of the right to an effective remedy.

40. Effective remedies for violations of privacy through digital surveillance can thus come in a variety of judicial, legislative or administrative forms. Effective remedies typically share certain characteristics. First, those remedies must be known and accessible to anyone with an arguable claim that their rights have been violated. Notice (that either a general surveillance regime or specific surveillance measures are in place) and standing (to

<sup>32</sup> See for example European Court of Human Rights, *Ekimdzhev v Bulgaria*, application No. 62540/00, 28 June 2007.

<sup>33</sup> A/HRC/13/37, para. 62.

<sup>34</sup> CCPR/C/21/Rev.1/Add. 13, para. 15.

challenge such measures) thus become critical issues in determining access to effective remedy. States take different approaches to notification: while some require post facto notification of surveillance targets, once investigations have concluded, many regimes do not provide for notification. Some may also formally require such notification in criminal cases; however, in practice, this stricture appears to be regularly ignored. There are also variable approaches at national level to the issue of an individual's standing to bring a judicial challenge. The European Court of Human Rights ruled that, while the existence of a surveillance regime might interfere with privacy, a claim that this created a rights violation was justiciable only where there was a "reasonable likelihood" that a person had actually been subjected to unlawful surveillance.<sup>35</sup>

41. Second, effective remedies will involve prompt, thorough and impartial investigation of alleged violations. This may be provided through the provision of an "independent oversight body [...] governed by sufficient due process guarantees and judicial oversight, within the limitations permissible in a democratic society."<sup>36</sup> Third, for remedies to be effective, they must be capable of ending ongoing violations, for example, through ordering deletion of data or other reparation.<sup>37</sup> Such remedial bodies must have "full and unhindered access to all relevant information, the necessary resources and expertise to conduct investigations, and the capacity to issue binding orders".<sup>38</sup> Fourth, where human rights violations rise to the level of gross violations, non-judicial remedies will not be adequate, as criminal prosecution will be required.<sup>39</sup>

#### IV. What role for business?

42. There is strong evidence of a growing reliance by Governments on the private sector to conduct and facilitate digital surveillance. On every continent, Governments have used both formal legal mechanisms and covert methods to gain access to content, as well as to metadata. This process is increasingly formalized: as telecommunications service provision shifts from the public sector to the private sector, there has been a "delegation of law enforcement and quasi-judicial responsibilities to Internet intermediaries under the guise of 'self-regulation' or 'cooperation'".<sup>40</sup> The enactment of statutory requirements for companies to make their networks "wiretap-ready" is a particular concern, not least because it creates an environment that facilitates sweeping surveillance measures.

<sup>35</sup> See *Esbest v. the United Kingdom*, application No. 18601/91, Commission decision of 2 April 1993; *Redgrave v. the United Kingdom*, application No. 202711/92, Commission decision of 1 September 1993; and *Mathews v. the United Kingdom*, application No. 28576/95, Commission decision of 16 October 1996.

<sup>36</sup> "Joint declaration on surveillance programs and their impact on freedom of expression", issued by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, June 2013 (available from [www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1)), para. 9.

<sup>37</sup> See for example *European Court of Human Rights, Segerstedt-Wiberg and others v. Sweden*, application No. 62332/00, 6 June 2006. See also CCPR/C/21/Rev.1/Add.13, paras. 15-17.

<sup>38</sup> A/HRC/14/46.

<sup>39</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex).

<sup>40</sup> See European Digital Rights, "The Slide from 'Self-Regulation' to Corporate Censorship", Brussels, January 2011, available at [www.edri.org/files/IDRI\\_selfreg\\_final\\_20110124.pdf](http://www.edri.org/files/IDRI_selfreg_final_20110124.pdf).

43. There may be legitimate reasons for a State to require that an information and communications technology company provide user data; however, when a company supplies data or user information to a State in response to a request that contravenes the right to privacy under international law, a company provides mass surveillance technology or equipment to States without adequate safeguards in place or where the information is otherwise used in violation of human rights, that company risks being complicit in or otherwise involved with human rights abuses. The Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011, provide a global standard for preventing and addressing adverse effects on human rights linked to business activity. The responsibility to respect human rights applies throughout a company's global operations regardless of where its users are located, and exists independently of whether the State meets its own human rights obligations.

44. Important multi-stakeholder efforts have been made to clarify the application of the Guiding Principles in the communications and information technology sector. Enterprises that provide content or Internet services, or supply the technology and equipment that make digital communications possible, for example, should adopt an explicit policy statement outlining their commitment to respect human rights throughout the company's activities. They should also have in place appropriate due diligence policies to identify, assess, prevent and mitigate any adverse impact. Companies should assess whether and how their terms of service, or their policies for gathering and sharing customer data, may result in an adverse impact on the human rights of their users.

45. Where enterprises are faced with government demands for access to data that do not comply with international human rights standards, they are expected to seek to honour the principles of human rights to the greatest extent possible, and to be able to demonstrate their ongoing efforts to do so. This can mean interpreting government demands as narrowly as possible, seeking clarification from a Government with regard to the scope and legal foundation for the demand, requiring a court order before meeting government requests for data, and communicating transparently with users about risks and compliance with government demands. There are positive examples of industry action in this regard, both by individual enterprises and through multi-stakeholder initiatives.

46. A central part of human rights due diligence as defined by the Guiding Principles is meaningful consultation with affected stakeholders. In the context of information and communications technology companies, this also includes ensuring that users have meaningful transparency about how their data are being gathered, stored, used and potentially shared with others, so that they are able to raise concerns and make informed decisions. The Guiding Principles clarify that, where enterprises identify that they have caused or contributed to an adverse human rights impact, they have a responsibility to ensure remediation by providing remedy directly or cooperating with legitimate remedy processes. To enable remediation at the earliest possible stage, enterprises should establish operational-level grievance mechanisms. Such mechanisms may be particularly important in operating countries where rights are not adequately protected or where access to judicial and non-judicial remedies is lacking. In addition to such elements as compensation and restitution, remedy should include information about which data have been shared with State authorities, and how.

## V. Conclusions and recommendations

47. International human rights law provides a clear and universal framework for the promotion and protection of the right to privacy, including in the context of domestic and extraterritorial surveillance, the interception of digital communications and the collection of personal data. Practices in many States have, however, revealed a

lack of adequate national legislation and/or enforcement, weak procedural safeguards, and ineffective oversight, all of which have contributed to a lack of accountability for arbitrary or unlawful interference in the right to privacy.

48. In addressing the significant gaps in implementation of the right to privacy, two observations are warranted. The first is that information relating to domestic and extraterritorial surveillance policies and practices continues to emerge. Inquiries are ongoing with a view to gather information on electronic surveillance and the collection and storage of personal data, as well as to assess its impact on human rights. Courts at the national and regional levels are engaged in examining the legality of electronic surveillance policies and measures. Any assessment of surveillance policies and practices against international human rights law must necessarily be tempered against the evolving nature of the issue. A second and related observation concerns the disturbing lack of governmental transparency associated with surveillance policies, laws and practices, which hinders any effort to assess their coherence with international human rights law and to ensure accountability.

49. Effectively addressing the challenges related to the right to privacy in the context of modern communications technology will require an ongoing, concerted multi-stakeholder engagement. This process should include a dialogue involving all interested stakeholders, including Member States, civil society, scientific and technical communities, the business sector, academics and human rights experts. As communication technologies continue to evolve, leadership will be critical to ensuring that these technologies are used to deliver on their potential towards the improved enjoyment of the human rights enshrined in the international legal framework.

50. Bearing the above observations in mind, there is a clear and pressing need for vigilance in ensuring the compliance of any surveillance policy or practice with international human rights law, including the right to privacy, through the development of effective safeguards against abuses. As an immediate measure, States should review their own national laws, policies and practices to ensure full conformity with international human rights law. Where there are shortcomings, States should take steps to address them, including through the adoption of a clear, precise, accessible, comprehensive and non-discriminatory legislative framework. Steps should be taken to ensure that effective and independent oversight regimes and practices are in place, with attention to the right of victims to an effective remedy.

51. There are a number of important practical challenges to the promotion and protection of the right to privacy in the digital age. Building upon the initial exploration of some of these issues in the present report, there is a need for further discussion and in-depth study of issues relating to the effective protection of the law, procedural safeguards, effective oversight, and remedies. An in-depth analysis of these issues would help to provide further practical guidance, grounded in international human rights law, on the principles of necessity, proportionality and legitimacy in relation to surveillance practices; on measures for effective, independent and impartial oversight; and on remedial measures. Further analysis also would assist business entities in meeting their responsibility to respect human rights, including due diligence and risk management safeguards, as well as on their role in providing effective remedies.